

THE DUTY OF CARE AND LIABILITY FOR PURELY ECONOMIC LOSS

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[The rules relating to recovery for purely economic loss, i.e. loss not causally consequential upon physical harm to the person or property of the plaintiff, represent in a sense the last frontier of tort liability for negligence and have been the subject of attention in a number of recent leading authorities culminating in the *Caltex Oil* decision in the High Court of Australia and the *Anns* case in the House of Lords. The interest in earning or maintaining wealth has traditionally been regarded as 'weak' in comparison to the 'strong' interests of physical security or property, since it amounts to an expectation rather than a legal right. In a comprehensive survey of the case law Professor Hayes analyses the various conceptual and policy aspects involved in extending this head of recovery, in particular the 'control devices' such as the 'joint venture' and 'special relationship' which have been imposed by the courts. He concludes with a restatement of the relevant principles as they have now developed, having suggested limits beyond which it is unlikely that the courts will venture within the foreseeable future.]

I INTRODUCTION

The interest in earning

This article is concerned with the interest in earning or maintaining wealth.¹ Typical of the situations to be discussed are the following: An oil company which is profitably using a convenient pipeline on the floor of a bay pursuant to an arrangement with the owner finds its income diminished when a negligently navigated dredge using negligently assembled navigational equipment fractures the pipeline, forcing the oil company's employment of more expensive methods of transporting and receiving the oil: *Caltex Oil (Aust.) Pty Ltd v. The Dredge 'Willemstad'*.² A professional man who is a policy holder of the defendant insurance company and a shareholder in its 'sister' company asks the insurance company if his investments are safe, no doubt hoping to profit from inside information. He is told that they are, so instead of selling his shares he buys more. He loses all when the company collapses: *Mutual Life and Citizens' Assurance Co. Ltd v. Evatt*.³ A purchaser buys a house built, as it turns out, on inadequate foundations. The foundations were not in accordance with the plans or the by-laws of the municipality; and if inspections had been made

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¹ Weir T., *A Casebook on Tort* (3rd ed. 1974) 469.

² (1976) 136 C.L.R. 529.

³ [1971] A.C. 793 (P.C.).

by the local council they had failed to reveal this. The purchaser finds that cracks are beginning to appear and that the floors are starting to slope. The market value of the house drops and expensive repairs will be necessary to make this good. The purchaser has, in other words, made a bad investment: *Anns v. Merton London Borough Council*.⁴ In each case the plaintiff is not in reality claiming, although in *Anns* he might appear to be, that his property was damaged or that his person was interfered with by the defendant and that *as a consequence* his earning capacity or level of wealth is depleted. Rather, he is claiming simply that he is poorer because of what the defendant did or did not do. Further, he is claiming for loss of wealth on the basis of no other aspect of the defendant's conduct than that it was simply careless.

We speak, in discussing the law of torts, of protection of the interest in reputation through the tort of defamation, of the interest in physical security through the torts of trespass to the person and negligence, of interests in free and uninterrupted use and enjoyment of land through the tort of private nuisance and so forth. *Caltex; Hedley Byrne & Co. Ltd v. Heller and Partners Ltd*⁵ and *Evatt* are concerned with protection, through the tort of negligence, of the interest in earning or maintaining wealth.

Apart altogether from the principles formulated in these cases to achieve a measure of protection of the interest in earning, there are in existence well-established rules of the law of torts already incidentally achieving this aim. Thus, negligence protects the money earner's tools of trade and plant and equipment from damage, and conversion protects them from theft. The torts of private and public nuisance combine to secure freedom from upsetting disturbance in, as well as freedom of access to, the work and market-place.⁶ The factor that makes the cases under discussion peculiarly difficult is that in them the courts are being asked to give compensation for purely economic loss unassociated with any other interference than that with the interest in earning, and on the basis of the defendant's carelessness.

Purely economic loss

Recognition of purely economic interests came relatively late in the history of the law of torts.⁷ The interest is a 'weak' one in comparison with *e.g.* the interest in physical security, which is extremely 'strong'. (This kind of comparison makes sense when one considers that one can jettison the cargo, but not the passenger, to save a ship; or detain property,

⁴ [1978] A.C. 728 (H.L. (E.)). The damage was described by the House of Lords as 'physical', but see *infra* 105 ff.

⁵ [1964] A.C. 465 (H.L. (E.)).

⁶ Weir, *loc. cit.*

⁷ Thus, it was not until *Pasley v. Freeman* (1789) 3 Term Rep. 51; 100 E.R. 450 (K.B.) that liability for intentionally inducing another to rely to his financial detriment upon a statement known to be false was clearly recognized.

but not its owner, as security for a debt).⁸ It had however been recognized at a very early stage that purely economic loss was recoverable if brought about by tortious interference with some interest other than that in earning or maintaining wealth. But before this is explored, 'purely economic loss' must be defined. Purely economic loss is not causally consequential upon physical harm to the person or property of the plaintiff. In the *Caltex* case Caltex lost a small quantity of its oil as a result of the fracture to the pipeline perpetrated by the careless defendants. But the major head of economic loss in respect of which Caltex claimed damages was totally unconnected with this loss of product, consisting rather in the cost of obtaining delivery of products to its terminal by alternative means.⁹ In the *Evatt* case the plaintiff suffered no physical harm, but complained of being misled into making and retaining bad investments. In *Anns*¹⁰ the loss to the plaintiff which the defendant council caused was construed as property damage but was in reality purely economic. The plaintiff was claiming from the council nothing more and nothing less than compensation for having been misled by it into making a bad investment.

As has already been noted, purely economic losses were at very early stages in the development of tort law recognized as recoverable where caused by tortious interference with interests independent of that in the earning and maintenance of wealth: e.g. the interest in maintenance of public rights (protected by public nuisance), of free and uninterrupted use and enjoyment of private land (protected by private nuisance), of one's good relationships with others (protected by defamation), of aspects of one's domestic relationships (e.g. the *actio per quod consortium amisit* for loss of the services of one's wife) or of aspects of one's employment relationships (e.g. the *actio per quod servitium amisit* for loss of the services of one's servant).¹¹

But the availability of such causes of action is limited by severe control devices. Thus, in private nuisance the plaintiff has to be the holder of an 'interest' in the land affected. In malicious prosecution 'malice' has to be established. And in such situations an important interest is involved apart from the interest in earning or maintaining purely financial resources. It is not simply a matter of a threat to the economic viability of an activity, the realization of an investment or the profitability of a transaction. Rather, the situation is one where land has been interfered with and as a consequence business has suffered; a reputation has been tarnished and as a consequence business has suffered; or one's (at early common law anyway) almost proprietary interest in one's wife or domestic servant has

⁸ Weir, *op. cit.* 3.

⁹ (1976) 136 C.L.R. 529, 559, 562, 578, per Stephen J.

¹⁰ [1978] A.C. 728, 759 f., per Lord Wilberforce (H.L. (E.)).

¹¹ *Hyde v. Scysson* (1619) Cro. Jac. 538; 79 E.R. 462 and *Guy v. Livesey* (1618) Cro. Jac. 501; 79 E.R. 428 being instances.

been interfered with and *as a consequence* one's financial resources have been depleted because of the need to employ replacements.

In these situations the loss is causally unconnected with any physical harm to the person or property of the plaintiff. But it is causally related to interference with an interest independent of that in maintenance of wealth. It flows from such an interference and for this reason it is likely to be recoverable in some tort other than negligence. The question for this article is however a quite separate one, namely, whether it be causally related or causally unrelated to some legally protected interest other than that in earning, *when is a carelessly inflicted purely economic loss recoverable in the tort of negligence?* The answer is very much affected by whether the carelessly caused purely economic loss in issue takes the form of a 'secondary harm' and whether it has been indirectly caused.

*Secondary harms*¹²

Where a person suffers harm as a consequence of the defendant's conduct and the plaintiff suffers harm in consequence, the latter harm might be described as 'secondary'. It may be personal harm, as was the case in *Best v. Samuel Fox & Co. Ltd*¹³ and *Bourhill v. Young*,¹⁴ or it may be purely economic, as in *Caltex*, where the plaintiff, who had been profitably using a third person's pipeline to transport his oil, was obliged to make expensive alternative arrangements when it was damaged by the careless defendants. In the 'secondary harm' situation *the defendant has caused harm to the third person which in turn causes harm to the plaintiff*.

Where the loss of which the plaintiff complains takes the form of a secondary harm (the problem is similar in those nervous shock cases where the injury has been suffered at the shock of witnessing or learning of the effects of the defendant's carelessness on its immediate victim¹⁵) the courts take the view that 'because of convenience, of public policy, or a rough sense of justice' the law should 'arbitrarily' decline 'to trace a series of events beyond a certain point. This is not logic. It is practical politics'.¹⁶ A system which draws the line at the immediate victim of carelessness and which generally refuses to compensate the mediate victim is administratively easy to operate. Furthermore, the drawn line reflects the aspiration that a defendant should not be subjected to a liability which is disproportionate to his wrong: an aspiration restated by the Privy Council in *The Wagon Mound (No. 1)*.¹⁷

¹² Weir, *op. cit.* 45.

¹³ [1952] A.C. 716 (H.L. (E.)), where recovery was denied.

¹⁴ [1943] A.C. 92 (H.L. (Sc.)), where recovery was denied.

¹⁵ See *infra* 101 nn. 30-1.

¹⁶ *Palsgraf v. Long Island Railway Co.* (1928) 162 N.E. 99, 103, *per* Andrews J. (New York Court of Appeals).

¹⁷ *Overseas Tankship (United Kingdom) Ltd v. Morts Dock and Engineering Co. Ltd* [1961] A.C. 388 (P.C.).

These sentiments have been manifested in decisions in nervous shock cases which held the clearly foreseeable unforeseeable.¹⁸ But they have been followed in that area by a franker approach which allows that even where it is reasonably foreseeable that careless infliction of injury to some third person will result in nervous shock to the plaintiff, there must be something special in the circumstances before a duty will be recognized and recovery allowed.¹⁹ Foreseeability is necessary but not sufficient for recovery for nervous shock when it takes the form of a secondary harm. It is simply one element in the sets of circumstances in which the courts are prepared to recognize that the careless defendant and the sufferer of nervous shock were in a 'proximate' relationship sufficient to generate a duty of care not to inflict such harm.

*Indirectly caused purely economic loss*²⁰

The problem is compounded in the purely economic secondary harm cases by the fact that the loss arises from interference with what is essentially a 'weak' interest. The interest in earning and maintaining wealth is essentially concerned with an *expectation*: a hope that economic benefit from a third party will be obtained or continued. It is very often interfered with, and purely economic loss very often occurs, as a consequence of an interference with a person's contractual relationship, actual or prospective, with a third party. Thus, the worker whose employer has been injuriously affected by the defendant might be deprived of his income, as might the merchant whose customers have been injuriously disaffected. Wages or profits may be lost or earnings diminished by interferences taking the form of a cutting off of the supply of labour, raw materials or the means of production, or by intimidation or dissuasion of customers. In this area we are concerned with tripartite relationships, *i.e.* where A has caused purely economic loss to B by interfering with B's advantageous economic relationships, actual or prospective, with C: usually by an interference with C.

But the tripartite relationship may not always take this particular form. A may have interfered with X (or X's property) on whom (or on which) B was economically dependent; as a consequence, B's economic relationships with C may have been interfered with, as where B is denied X's product or facilities (because of damage to X's property) and as a result cannot fulfil orders under contracts with C, losing profits on the transactions, or where B can no longer take advantage of his contract of supply with X and must therefore enter a much less advantageous economic relationship with C for the supply of alternative products or facilities: broadly, the circumstances of the *Caltex* case. Alternatively, A

¹⁸ *E.g.*, *Chester v. Waverley Corporation* (1939) 62 C.L.R. 1.

¹⁹ *Pratt v. Pratt* [1975] V.R. 378 (F.C.).

²⁰ Weir, *op. cit.* 469-72.

may have misled B into contracting with C to his disadvantage: the situation in *Evatt and Hedley Byrne*.

There exist a number of torts dealing with indirectly caused purely economic loss, namely, inducing breach of contract, malicious falsehood, conspiracy and passing off; in none of them is carelessly caused purely economic loss actionable. It is difficult to formulate a minimum principle of liability in this area, but it seems that a principle is beginning to emerge whereby purely economic loss is recoverable if *intentionally* caused by *unlawful* means.²¹ Thus, in the situation posited above, while it is a tort deliberately to cut off the supply of electricity to the plaintiff's factory with the intention of causing him to lose contracts with customers, it is not a tort where this is only carelessly done.²² The minimum principle of liability which permeates the torts concerned with indirectly caused purely economic loss thus requires a much higher level of misconduct than mere carelessness. Why is this so?

The nature of the interest in earning

The answer to the question just posed lies in the nature of the interest in earning or maintaining wealth, namely that it is a 'mere expectation' and is not 'property' or a 'right'.

One of the basic concepts of the legal system is that of 'a subject of the legal system (a creature of rights and duties)'. Another is that of 'an object (a "thing" which may be controlled by the subject)'.²³ The legal system, principally through the law of torts, aims to protect its subjects and the objects which it allows its subjects to control from certain kinds of interference by other subjects.

The nature of objects, that is

the 'things' in which interests exist, is not limited by their physical characteristics, or by their tangible or intangible natures. So, in our legal system, while human beings cannot be objects, land, goods, animals and certain intangible concepts may be. A debt or a patent (inventions of the legal system) [and copyright] may be just as much objects in which a person may have an interest as a house or a motor car.²⁴

The main purpose of that body of the rules of the legal system classified as 'the law of torts' is to provide remedies of compensation or recovery

²¹ For a recent affirmation of at least a portion of the principle in the text see *Ex parte Island Records Ltd* [1978] Ch. 122, 136 f., per Lord Denning M.R. His Lordship mentioned the requirement of 'unlawfulness' for actionability of an interference with an advantageous relationship, referring to unlawfulness arising from tort, crime or non-compliance with a statute. See *Sid Ross Agency Pty Ltd v. Actors etc. Equity etc.* (1970) 90 W.N. (Pt. 1) (N.S.W.) 743 for an expression of such a general principle as permeating these torts, and generally, Heydon J. D., 'The Future of the Economic Torts' (1975) 12 *University of Western Australia Law Review* 1. The term 'intention', as employed in the text, does not necessarily connote 'desire to harm' but rather actual foresight of its likelihood and knowledge that it is likely to occur if one persists with the course of conduct in question.

²² *Caltex* (1976) 136 C.L.R. 529, 598, per Jacobs J.

²³ Jackson D. C., *Principles of Property Law* (1967) 3.

²⁴ *Ibid.* 7 f.

for the consequences of interference with the legally recognized interests of a subject of the legal system *in himself or in an object*; and it must be remembered that the law of torts does not recognize all interests, e.g. privacy,²⁵ which may from time to time be asserted by its subjects.²⁶

Standards of liability

Another function of the law of torts is to determine the basis of liability upon which the ability to recover the remedy sought will be determined. The law of torts might, in determining the standard of liability where an interest has been interfered with, have settled on a general policy of absolute liability. But it has not. Where interference with the interest occurs liability may, especially if the object is land, be 'strict'. Generally however liability depends upon proof of fault. But what approach has it adopted where the interest which the subject is asserting is a freedom to enter the market-place and to compete with others, each asserting an identical interest, for the means by which each might acquire more 'objects', i.e. the interest in earning? Take for example a supermarket chain which sets up a branch next to the corner store with the avowed purpose, to be achieved by price cutting, of ruining the latter. It does so and, its purpose achieved, the operations of this particular branch are brought to an end. Its conduct, as judged by reference to the torts concerned with compensation for indirectly caused purely economic loss, would not be tortious, notwithstanding that it has intentionally interfered with the interest of its competitor in earning. Something more is required. And it is patently obvious that in this kind of situation mere carelessness is not actionable. The duty of care has not been allowed to operate in this context to generate liability.

It is in the foregoing analysis that the answer to why this is so may be found. In the indirectly caused loss of wealth cases the interference is with the 'healthy' subject's attempts to acquire more interests in objects than he already possesses, and although this is a concern of the law of torts it is not a primary concern. While the attempts of the 'healthy' subject to obtain more 'things' are taken seriously, they rank below the claims of the subject to retain his 'health' and 'things' free from damage and loss. But this is only part of the explanation. The subject whose health or property has been damaged is asserting an interest — in a subject or object of the legal system — which is generally unqualified by the assertion by anyone else of any similar interest in that subject or object. But the person whose purely economic interests are indirectly interfered with is generally asserting a claim for protection of an interest which is *not one in any subject or object of the legal system* and which is identical to that being

²⁵ See *Victoria Park Racing and Recreation Grounds Co. Ltd v. Taylor* (1937) 58 C.L.R. 479.

²⁶ See Lipstein K., 'Protected Interests in the Law of Torts' [1963] *Cambridge Law Journal* 85.

asserted not only by the defendant but, potentially, by the whole community. Grave misconduct, *i.e.* something more than mere unfairness or carelessness on the part of a competitor in the race, will therefore generally be required before he will be disqualified or penalized.

Statements causing purely economic loss

The obstacles in the way of recognizing liability in tort for carelessly inflicted purely economic loss are thus great. *A fortiori* where such loss has resulted from careless words (misstatement). Liability for words has developed differently from that for acts.²⁷ Acts were of course the first and primary preoccupation of the law of torts.²⁸ Furthermore, where purely economic loss flows from statements the parties are normally face-to-face and either bargaining about something or asking for and receiving advice pursuant to a contractual or fiduciary relationship; and in these situations there were remedies for misstatements. So low on the scale of interests was the interest in earning and maintaining wealth that the attempt to develop tort remedies to deal with merely careless misstatements passing between persons not privy to contractual or fiduciary relationships was very late in coming.

But there were other factors. It is very easy to be wrong about something. 'Misstatements' in ordinary and even business and professional conversation trip from the most measured of speakers. People are much less careful in speech than in action. Further, to take too strict a view of those occasions where merely careless words do in fact hurt — especially if the 'hurt' is purely (and merely) financial — would unduly interfere with freedom of expression, a highly valued interest recognized in all subjects of the legal system for very positive policy reasons. To determine liability for careless misstatements causing purely economic loss according to the same test as that adopted for careless actions causing physical harm, namely the 'neighbour principle', would thus be to override and make redundant the rules of torts such as defamation formulated in a developmental period lasting centuries to protect that interest where challenged by other private interests. If a newspaper were to publish untrue and defamatory matter concerning a politician causing him to lose his parliamentary seat it might, if the publication were unjustifiable according to rules such as those relating to qualified privilege, be rendered liable to compensate him for the economic consequences. The 'neighbour principle' if applied here might allow him to recover where the publishers were only careless and the kind of harm foreseeable, thus destroying the delicate balance between competing interests achieved by the tort of defamation.

²⁷ *Nocton v. Lord Ashburton* [1914] A.C. 932, 947 (H.L. (E.)).

²⁸ *Supra* 80 n. 7.

Conduct affecting economic decision-making by the plaintiff and others

Purely economic loss, at least in one class of case, namely the 'misstatement' class, arises from conduct on the defendant's part which even if performed carelessly involves no direct risk of physical harm. Typical of this class are the following situations:

- advising on an economic transaction when one should remain silent;
- carelessly compiling advice where it is proper that one should give advice on an economic transaction;
- carelessly expressing advice where it is proper that one should give advice on an economic transaction;
- improperly *deciding not to exercise powers* of inspection of 'objects' in preparation for the market;
- improperly *exercising powers* of inspection of 'objects' in preparation for the market;
- careless preparation of information contained in a report on a financial matter furnished pursuant to a public or private duty;
- careless expression of information contained in a report on a financial matter furnished pursuant to a public or private duty;
- careless or improper performance of an adjudicative role affecting the subject's economic or other interests.

These broad headings are merely illustrative of the kinds of situations which have come before the courts since *Hedley Byrne*. They are not exhaustive. But all have certain things in common. The act of speaking, of researching in a library, of mentally assessing the information obtained from research and committing it by pen to paper, of cross-examining in a court room, of grading an examination paper, of auditing company accounts, of inspecting construction work for inadequacies in the foundations, of failing to do so — and so on — cannot *in the way it is performed* lead directly to physical harm. And where it leads to purely economic harm it does so because of a singular causal sequence, namely that there is interposed between the conduct in question and the purely economic loss which results an exercise of discretion by the plaintiff or a third party in acting upon it. The defendant, by inducing a belief in a state of affairs, causes the plaintiff to enter into an unfavourable transaction with the defendant himself or a third party, or alternatively causes some third person to act to the plaintiff's economic detriment. His conduct provides *a reason* for the plaintiff or some third person to act — for example, the plaintiff who on the basis of the defendant's audit of its affairs purchases shares in a company, or an arbitrator who decides against the plaintiff after the incompetent presentation by the defendant of his case; and, of course, when that action is taken the purely economic loss results. One is concerned here, in other words, with 'interpersonal transactions'. This is not the way harm normally occurs in 'strong' situations in the law of torts, e.g. motor vehicle accidents, and the situation is one with

which it is conceptually difficult to cope. (Similar difficulties are experienced in the area of liability for carelessly failing to control the conduct of others, such duty being recognized as significantly different from that to control one's own activities or one's property.²⁹) Thus, it was not surprising that in 1964 Lord Devlin was able to remark in *Hedley Byrne*³⁰ that

[counsel] for the appellants . . . has not been able to cite a single case in which a defendant has been held liable [in tort] for a careless statement leading, otherwise than through the channel of physical damage, to financial loss.

Traditionally, the description 'misstatement' has been reserved for the *Hedley Byrne* or *Evatt* kind of situation. But each of the situations set out above, including of course the *Hedley Byrne* and *Evatt* situation, has three fundamental features in common: the conduct in question is incapable of directly causing physical harm; the harm arises out of an interpersonal transaction; and the loss complained of is purely economic. And because of this each can be described as 'weak', in each case for the same reasons. 'Strong' factors must be present to generate liability in such situations. In the *Hedley Byrne* and *Evatt* situation these factors are 'knowledge' and 'undertaking/reliance'.³¹ It is a fundamental thesis of this article that because of their common problems and 'weaknesses' liability in the other situations just set out should also be tested by reference to these factors. They are in essence all 'misstatement' situations and should be resolved by reference to the factors recognized in *Hedley Byrne* and *Evatt* as being necessarily present for their inherent 'weakness' to be counterbalanced and liability accordingly imposed.

The policies and values set out in the preceding paragraphs and elsewhere³² resulted in a framework of rules which prior to the recent landmark cases in this area, *Hedley Byrne*,³³ *Evatt*,³⁴ *Dutton v. Bognor Regis U.D.C.*,³⁵ *Anns*,³⁶ *Batty v. Metropolitan Property Realisations Ltd*³⁷ and *Caltex*,³⁸ might have been stated in terms of certain general propositions.³⁹ These propositions have been set out at the conclusion of this article and the effects of the recent landmark cases have been superimposed upon them.

²⁹ *Home Office v. Dorset Yacht Co. Ltd* [1970] A.C. 1004, per Lord Diplock (H.L. (E.)).

³⁰ [1964] A.C. 465, 515 (H.L. (E.)).

³¹ See *infra* 119 f.

³² See Weir J. A., 'Liability for Syntax' [1963] *Cambridge Law Journal* 216; Symmons C. R., 'The Duty of Care in Negligence: Recently Expressed Policy Elements' (1971) 34 *Modern Law Review* 394 and 528.

³³ [1964] A.C. 465 (H.L. (E.)).

³⁴ [1971] A.C. 793 (P.C.).

³⁵ [1972] 1 Q.B. 373 (C.A.).

³⁶ [1978] A.C. 728 (H.L. (E.)).

³⁷ [1978] Q.B. 554 (C.A.).

³⁸ (1976) 136 C.L.R. 529.

³⁹ See *infra* 119 f.

II THE DUTY OF CARE

It is now clearly established that where purely economic loss arises from conduct which is merely 'careless' — as opposed to 'intentional'⁴⁰ or 'unlawful'⁴¹ — the tort of negligence may in certain circumstances provide an avenue of recovery; and the principal control device developed by the courts to limit such recovery against a merely careless defendant is that of the duty of care. It is through the medium of this device that the policies and values set out in the preceding section have been expressed in the definitions of the extremely narrow sets of circumstances wherein such recovery will be possible.⁴² In these circumstances it will be said that the relationship between plaintiff and defendant is a 'proximate'⁴³ or 'special' one, thus permitting recovery in respect of mere carelessness. A brief review of the duty of care, particularly as it operates in other areas where the 'liability generating' factors are 'weak', will be of assistance in explaining its operation in the particular context of liability for purely economic loss.

The neighbour principle

Foreseeability is a criterion that may be applied negatively in determining that a duty of care does not exist because the hypothetical reasonable man would not in the circumstances have foreseen that failure to take care would result in injury to the plaintiff. However, it cannot be applied positively in every case to impose a duty of care upon the defendant merely because damage to the plaintiff was reasonably foreseeable. A number of illustrations of the limitations of the foreseeability criterion were provided by Denning L.J. (as he then was) in *Candler v. Crane, Christmas & Co.*,⁴⁴ each being a situation where although it may have been reasonably foreseeable that damage would result from the failure of the maker of a report to take reasonable care the law does not impose a duty of care towards persons for whose purposes the report was not specifically prepared.

The policy factor

C. R. Symmons, after reviewing recent negligence cases including the line of cases commencing with *Hedley Byrne*,⁴⁵ commented that

⁴⁰ In which case one of the torts concerned with intentional infliction of economic loss by unlawful means might be available. See *supra* 84 n. 21.

⁴¹ In which case, in Australia, the action on the case for unlawfully inflicted loss might be available. See *Beauesert Shire Council v. Smith* (1966) 120 C.L.R. 145.

⁴² See *infra* 119 f.

⁴³ It seems that the traditional use of the term 'proximity' is to describe cases of negligence by an act leading to physical harm where it is held that there is a duty of care. See *Caltex* (1976) 136 C.L.R. 529, 572 f., per Stephen J.

⁴⁴ [1951] 2 K.B. 164, 183 (C.A.).

⁴⁵ *Supra* 88 nn. 33-8. It is important to emphasize that that line is in fact an amalgamation of three distinct lines of development, involving extensions of (1) liability for misstatements causing purely economic loss: the *Hedley Byrne* line; (2)

in the realm of misstatement and pure economic loss — if the Atkinian principle ever was relevant there — it appears to be suffering or have suffered a total eclipse.⁴⁶

The neighbour principle, once a smokescreen for 'policy' considerations in negligence, and having served a useful function in the tort's formation period, has now been cast aside.⁴⁷ This was indeed the view of Lord Denning M.R. in *Dutton v. Bognor Regis U.D.C.*⁴⁸ But few judges will go so far.⁴⁹

In the *Caltex* case⁵⁰ Gibbs and Stephen J.J. emphasized that competing reasons of policy should not be weighed and applied directly in each individual case but rather that principles of law which can be applied to the case at hand and to subsequent cases and which can be used in defining rights and duties should be derived from policy, thereby avoiding uncertainty and judicial diversity.

'Policy': justification and methodology

'Policy' comprehends a judicial consideration of relevant extra-legal interests of the society at large, including not only the interests of the parties and the courts but also those of the public generally, and of other relevant factors such as the social outlook and stage of development of the society at the time when the court is being asked to create the new duty situation.⁵¹ According to Lord Diplock in *Home Office v. Dorset Yacht Co. Ltd* judges give effect to their conceptions of such interests because of 'the cumulative experience of the judiciary of the actual consequences of lack of care in particular instances'.⁵² Of this justification for giving effect to policy in negligence it might be observed⁵³ that the negligence cases that judges see represent only a very small tip of the iceberg, the vast majority being settled by negotiation. While theoretically such settlements depend on an assessment of the current state of the law of torts, a large part is played in them by the availability of evidence, the plaintiff's need for immediate funds and the hazards of litigation. Settlements are in turn only part of that invisible below-the-surface mass of cases that lead to no action at all. Thus judges do not see a representative sample upon which any accurate assessment of the situation might be

liability for economic loss consequential upon physical harms: the *Dutton-Anns* line; and (3) liability for purely economic loss as a secondary harm: the *Caltex* line. They do not shed light on each other. See *infra* 115 n. 21.

⁴⁶ Symmons, *op. cit.* 538 f.

⁴⁷ *Ibid.* 538.

⁴⁸ [1972] 1 Q.B. 373, 397 (C.A.).

⁴⁹ See especially *Anns* [1978] A.C. 728, 751 f., *per* Lord Wilberforce (H.L. (E.)).

⁵⁰ (1976) 136 C.L.R. 529, 554 f., *per* Gibbs J.; 565-8, *per* Stephen J. And see also *Mount Isa Mines Ltd v. Pusey* (1970) 125 C.L.R. 383, 396, *per* Windeyer J.

⁵¹ See the cases cited by Symmons, *op. cit.* 400 f.

⁵² [1970] A.C. 1004, 1058 (H.L. (E.)).

⁵³ For these comments I am indebted to my colleague Professor Harold Luntz of the University of Melbourne.

made. Perhaps it is this realization which makes the judges essentially conservative policy makers. Their methodology was described by Lord Diplock in *Dorset Yacht*.⁵⁴ This approach might be analyzed by applying it to some hypothetical future claims for extensions of the principle in the *Caltex* case to novel situations not falling precisely within the boundaries drawn by that decision.

Two examples of such novel situations might be instructive. In the first the facts are identical to *Caltex* except that the oil company's operation and use of the pipeline begin for the first time on the day of the accident. In addition, the crew of the dredge (the first defendant) is a new one with no experience of the bay or the bed on which the pipeline has been placed. The suppliers of the navigation equipment (the second defendant) have no knowledge of the nature of the plaintiff's proposed use of the pipeline, although the extension of the pipeline is noted by navigation equipment (albeit defective) supplied to the dredge operators. In this situation the oil company which suffers purely economic loss when the pipeline is fractured as a consequence of careless navigation of the dredge and defective navigation equipment would be met by the requirement formulated by 'the majority' (*i.e.* those judges in *Caltex* who pursued a more or less common approach to the problem: Gibbs, Stephen and Mason JJ.⁵⁵) that for recovery of purely economic loss when suffered in the form of a secondary harm there must be knowledge or means of knowledge⁵⁶ on the part of the defendant that the plaintiff was likely to be affected in this way. In the second example the facts are again identical to *Caltex*, but in addition to or instead of the economic disadvantage in fact suffered in that case the oil company claims in respect of 'loss of profits arising because collateral commercial arrangements are adversely affected'.⁵⁷ The plaintiff in *Caltex* made no such claim and Stephen and Jacobs JJ. both indicated that such losses would not be recoverable.⁵⁸ In other words, the hypothetical question here is whether in addition to *expenses incurred* to avoid loss of benefits under contracts with third parties (the kind of loss in fact recovered in *Caltex*) *benefits under contracts in fact lost* by the plaintiff as a result of the defendant's interference with third party property will also be recoverable.

Would *Caltex* be extended to cover each of these hypothetical situations? We must first seek, according to Lord Diplock in *Dorset Yacht*:

to identify the relevant characteristics that are common to the kinds of conduct and relationship between the parties which are involved in the case for decision and the kinds of conduct and relationships which have been held in previous decisions of the courts to give rise to a duty of care.

⁵⁴ [1970] A.C. 1004, 1058 ff. (H.L. (E.)).

⁵⁵ (1976) 136 C.L.R. 529, 555, *per* Gibbs J.; 575-9, *per* Stephen J.; 592 f., *per* Mason J.

⁵⁶ See further *infra* 108 n. 73.

⁵⁷ (1976) 136 C.L.R. 529, 577, *per* Stephen J.

⁵⁸ *Ibid.* 577, *per* Stephen J.; 599, *per* Jacobs J.

The method adopted at this stage of the process is analytical and inductive. It starts with an analysis of the characteristics of the conduct and relationship involved in each of the decided cases. But the analyst must know what he is looking for and this involves his approaching his analysis with some general conception of conduct and relationships which ought to give rise to a duty of care. This analysis leads to a proposition which can be stated in the form:

In all the decisions that have been analysed a duty of care has been held to exist wherever the conduct and the relationship possessed each of the characteristics A, B, C, D, etc. and has not so far been found to exist when any of these characteristics were absent.⁵⁹

In the purely economic secondary harm cases the salient characteristics are as follows:

A. The defendant owes the third party a duty of care not to affect his property.

B. Purely economic loss to a class of which the plaintiff is a member flowing from interference with the third party's property is foreseeable.

C. The plaintiff, while having no proprietary or possessory interest in the third party's property,⁶⁰ is nevertheless physically making use of it *with the third party's consent* (i.e. he has a 'licence'⁶¹) as part of his operation, as where:

1. The plaintiff and third party are engaged in a joint venture, e.g. the third party is carrying the plaintiff's cargo (undamaged) in his vessel (damaged by defendant's negligence) at sea: *Morrison Steamship Co. Ltd v. Greystoke Castle (Cargo Owners)*⁶²; or

2. The plaintiff is using the third party's equipment (damaged by defendant's negligence) in his operation, e.g. the third party's pipeline is used to carry the plaintiff's oil: the *Caltex* case.⁶³

D. The defendant had knowledge or the means of knowledge of the particular plaintiff's 'licence' and the likely economic consequences to the plaintiff of disruption to its activities.

E. The loss which the plaintiff sustains is in the form of an economic detriment⁶⁴ other than the loss of an anticipated profit in a transaction with another.

It is now appropriate to move on to Lord Diplock's second stage,

which is deductive and analytical. . . . [T]hat proposition is converted to: 'in all cases where the conduct and relationship possess each of the characteristics A, B, C, D etc. a duty of care arises.' The conduct and relationship involved in the case for decision is then analysed to ascertain whether they possess each of these characteristics. If they do the conclusion follows that a duty of care does arise in

⁵⁹ [1970] A.C. 1004, 1058 f. (H.L. (E.)).

⁶⁰ See *infra* 104 n. 50.

⁶¹ See *infra* 105 n. 53.

⁶² [1947] A.C. 265 (H.L. (E.)); discussed *infra* 108.

⁶³ (1976) 136 C.L.R. 529.

⁶⁴ See *infra* 112 n. 1.

the case for decision. . . . The proposition used in the deductive stage is not a true universal. It needs to be qualified so as to read:

In all cases where the conduct and relationship possess each of the characteristics A, B, C, and D etc. but do not possess any of the characteristics Z, Y or X etc. which were present in the cases eliminated from the analysis, a duty of care arises.

But this qualification, being irrelevant to the decision of the particular case, is generally left unexpressed.⁶⁵

From the selection of previous cases to be analysed in the context of possible extensions of *Caltex* there will have been eliminated 'those in which the conduct or relationship involved possessed characteristics which are obviously absent in the case for decision', e.g. where the economic loss was intentionally inflicted by unlawful means or where it was consequential upon damage to the plaintiff's property ('characteristics Z, Y or X etc.', which if present will clearly lead to recovery for economic loss and which are clearly absent from the hypothetical examples of possible future extensions of *Caltex*). The question then arises

whether or not to extend the kinds of conduct or relationships which give rise to a duty of care, the conduct or relationship which is involved in [the case in hand lacking] at least one of the characteristics A, B, C or D etc.⁶⁶

This choice involves making a policy decision

as to whether or not a duty of care ought to exist if the characteristic which is lacking were absent or redefined in terms broad enough to include the case under consideration. The policy decision will be influenced by the same general conception of what ought to give rise to a duty of care as was used in approaching the analysis. The choice to extend is given effect to by redefining the characteristics in more general terms so as to exclude the necessity to conform to limitations imposed by the former definition which are considered to be inessential.⁶⁷

In making this policy decision the judges will be positively influenced by factors which in other areas of the law of torts are strongly prone to generate liability and which are in fact present in the instant case, although absent (or previously undetected) in the decided cases from which it is sought to deduce the broader principle.

In the first hypothetical extension of the facts of *Caltex* under discussion the factor that the plaintiff and third party are involved in what broadly speaking is a joint venture is a particularly significant one, for in another area where the question of liability in negligence for secondary harms arises, the nervous shock cases, it has been significantly present in at least one case where recovery was allowed.⁶⁸ Where it is manifestly present in future purely economic secondary harm cases it may result in a dilution of the strictness of the knowledge requirement much along the lines suggested in the area of an occupier's liability to a licensee for concealed dangers which he *knows* to exist on his land, and may lead to recovery in situations such as the first hypothetical example. Its absence from the facts of *Spartan Steel & Alloys Ltd v. Martin & Co. (Contractors)*

⁶⁵ *Dorset Yacht* [1970] A.C. 1004, 1059 (H.L. (E.)).

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ See *infra* 101 n. 34.

*Ltd*⁶⁹ provides, it is submitted, a legitimate ground of distinction between that case and *Caltex* and a sufficient justification for the view that the decision not to allow recovery of the lost profits claimed in that case was correct and should be followed.⁷⁰

While 'the cases eliminated from the analysis' which 'possess any one of characteristics Z, Y or X etc.' do not figure positively in the decision whether or not to extend the rule in question, they do operate to set outer limits beyond which it will not be pushed. The judges will not by a sidewind abolish one tort by extending another.⁷¹ Thus, in the second hypothetical example it might be very difficult to persuade the courts to allow recovery where characteristic E is absent and recovery is sought for loss of profit under a contract with a third party, for to do so would subvert the torts establishing rules for recovery of indirectly caused purely economic loss. This provides another justification for *Spartan Steel* and another basis for distinction between it and *Caltex*.

The policy decision in negligence generally arises in the context of a determination as to whether a broad, general liability generating principle, e.g. the 'neighbour principle', should be applied in a new factual situation. 'Policy' generally provides a reason for the *non-application* of a liability generating rule. It generally prevents liability in a situation where one might expect it to arise and where there is no decision or general principle against it, rather than creating it in a situation where on the authorities it might appear to be excluded by decision or well-established general principle.⁷² Policy is at its strongest where liability generating factors are at their weakest, i.e. in cases involving omissions, failure to control the conduct of others, misstatements and purely economic loss.⁷³ But policy has in the past also played a role where liability is strongly indicated. There are indeed many situations where a duty has been withheld for policy reasons notwithstanding foreseeability of harm to the plaintiff of the kind in question.⁷⁴ Thus, to add to Lord Denning's list, there is the refusal to recognize any duty in a finance company to register a hire-purchase agreement with an organization set up by finance companies in

⁶⁹ [1973] Q.B. 27 (C.A.).

⁷⁰ See further *infra* 104.

⁷¹ See e.g. *Bird v. Jones* (1845) 7 Q.B. 742; 115 E.R. 668, where the Court in effect refused to override public nuisance by extending false imprisonment.

⁷² Thus, in *Stoneman v. Lyons* (1975) 133 C.L.R. 550 there was no suggestion that any policy of 'loss spreading' should be applied, with the High Court adhering to the general rule disallowing recovery against an employer for the torts of his independent contractor and refusing to endorse an apparent exception based on 'extra-hazardous' activities: the rule in *Honeywill & Stein Ltd v. Larkin Bros (London's Commercial Photographers) Ltd* [1934] 1 K.B. 191 (C.A.). In any event, the policy is regarded as suspect. See e.g. the observations in *Morgans v. Launchbury* [1973] A.C. 127 (H.L. (E.)).

⁷³ See *infra* 97 ff.

⁷⁴ See e.g. *Shaw Savill and Albion Co. Ltd v. The Commonwealth* (1940) 66 C.L.R. 344, a case of collision of ships at sea. For a detailed list of exclusions see *Candler v. Crane, Christmas and Co.* [1951] 2 K.B. 164, *per* Denning L.J.

order to prevent fraud in connection with hire purchase transactions,⁷⁵ an employer to protect the employee's property from theft or other criminal deprecation by a third party,⁷⁶ forwarding agents to owners of goods in respect of fraudulent or criminal acts by third parties,⁷⁷ or a judge or arbitrator to the litigant in the case before him⁷⁸ and the ruling that a claim of negligence against university examiners is not justiciable in a court.⁷⁹ *Rondel v. Worsley*⁸⁰ of course provides another example.⁸¹

Flexible standard setting

Flexible standard setting is becoming a feature of the law of torts.⁸² Thus, if the plaintiff is fully aware of disabilities in the defendant which will be such as to affect the defendant's capacity to perform the task which he has undertaken to the standard which is reasonably to be expected from those generally involved in such activities — examples of such incapacities would be drunkenness,⁸³ inexperience⁸⁴ and physical incapacity⁸⁵ — but nevertheless voluntarily enters into a relationship with the defendant whereby he is exposed to the risk of harm, e.g. accepting a lift from an obviously drunken driver⁸⁶ or submitting one's arm to a watchmaker for tattooing,⁸⁷ then in Australia, if not in England,⁸⁸ he cannot claim the benefit of any higher standard of care than that which could reasonably be expected from a 'reasonable' person with such disabilities.⁸⁹ So also, if the arm submitted to a watchmaker for tattooing becomes infected due to the failure to take a precaution which the experienced tattooist would take, the necessity for such precaution being something which would not occur to the average watchmaker, there would be no breach of duty.⁹⁰ But if it was one which was so elementary that even watchmakers undertaking such a task would observe it — such as sterilizing the needle — there would be a breach of the appropriate standard of care. The Privy

⁷⁵ *Moorgate Mercantile Co. Ltd v. Twitchings* [1977] A.C. 890 (H.L. (E.)).

⁷⁶ *Edwards v. West Herts Group Hospital Management Committee* [1957] 1 W.L.R. 415 (C.A.).

⁷⁷ *Pringle of Scotland Ltd v. Continental Express Ltd* [1962] 2 Lloyd's Rep. 80; *contra: Lee Cooper v. C.H. Jeakins & Sons Ltd* [1967] 2 Q.B. 1.

⁷⁸ See *Arenson v. Arenson* [1977] A.C. 405 (H.L. (E.)); although this immunity does not extend to a 'mutual' valuer who is not exercising any judicial function, as where an auditor of a private company values shares in the company aware that his valuation is to determine the price to be paid for them under a contract for their sale.

⁷⁹ *Thorne v. University of London* [1966] 2 Q.B. 237 (C.A.).

⁸⁰ [1969] 1 A.C. 191 (H.L. (E.)).

⁸¹ But see now also *Saif Ali v. Sidney Mitchell & Co.* [1978] 3 W.L.R. 849 (H.L. (E.)).

⁸² See e.g. as to hospitals: *Cassidy v. Ministry of Health* [1951] 2 K.B. 343, 362 f., *per Denning L.J.* — a duty to see that care is taken; and as to neighbouring occupiers: *Goldman v. Hargrave* [1967] 1 A.C. 645 (P.C.).

⁸³ *Insurance Commissioner v. Joyce* (1948) 77 C.L.R. 39.

⁸⁴ *Chang v. Chang* [1973] 1 N.S.W.L.R. 708 (C.A.).

⁸⁵ *Joyce* (1948) 77 C.L.R. 39, 56, *per Dixon J.*

⁸⁶ *Joyce* (1948) 77 C.L.R. 39.

⁸⁷ A situation of a kind discussed generally *ibid.*

⁸⁸ See *Boardman v. Sanderson* [1964] 1 W.L.R. 1317 (C.A.).

⁸⁹ *Joyce* (1948) 77 C.L.R. 39.

⁹⁰ *Ibid.*

Council in the *Evatt* case⁹¹ used a perceived inability to set an appropriate standard as a reason for withholding a duty of care under the *Hedley Byrne* principle where careless advice is given on a subject by someone not in the business of giving that kind of advice. But in the light of the Australian decisions (and after all *Evatt* was a Privy Council appeal from Australia) this reasoning would seem distinctly hollow. It seems indeed that, as Professor Fleming points out,⁹² the decision might have been influenced by an unenunciated application of the generally discredited 'loss distribution' policy,⁹³ an unexpressed premise being that professional advisers alone would be insured.⁹⁴ Indeed it seems that underwriters are reluctant to offer 'act, error and omission' policies to applicants outside the traditional professions.⁹⁵

The calculus of risk of purely economic loss

The calculation of risk, an inevitable process in most duty situations, will be avoided in purely economic loss cases. In the secondary harm cases foreseeability has been largely displaced by a requirement of actual knowledge (or the means thereof) that the plaintiff *as an individual* is likely to be affected economically. Thus, in the *Caltex* case⁹⁶ the defendants were assumed by the High Court to have known that if the third party's pipeline were to be fractured the plaintiff would suffer some kind of economic detriment; and this was a key element of the decision in favour of recovery.⁹⁷ Here we are concerned with the drawing of inferences as to the defendant's knowledge from established facts:⁹⁸ with situations where it is established that A had knowledge of or possession of facts from which it could be inferred that he concluded (or a reasonable person would have concluded) that B was economically dependent on X's pipeline and that if it were fractured B would suffer economically. Furthermore, in those situations where purely economic loss is a primary harm flowing from conduct not in itself capable of directly causing physical harm, the *Hedley Byrne* situation, foreseeability is again largely excluded by the invocation of the much more stringent requirements of knowledge in the

⁹¹ [1971] A.C. 793.

⁹² Fleming J. G., *The Law of Torts* (5th ed. 1977) 628 f.

⁹³ See *supra* 94 n. 72.

⁹⁴ Fleming, *op. cit.* 629.

⁹⁵ *Ibid.* 629 n. 8.

⁹⁶ (1976) 136 C.L.R. 529.

⁹⁷ Whether this was in fact found at the trial, particularly in relation to the second defendant, which supplied the navigational equipment, is apparently a matter of some controversy. Nevertheless, of 'the majority' Gibbs J. said that the defendants 'knew that the pipeline led directly from the refinery to Caltex's terminal. . . . Moreover, the pipeline appeared to be designed to serve the terminal particularly'. This therefore brought the case within the exceptional class 'in which the defendant has knowledge or means of knowledge that the plaintiff individually, and not merely as a member of an unascertained class, will be likely to suffer economic loss . . .': *ibid.* 555 f. As to Stephen and Mason JJ. See *infra* 108 n. 70.

⁹⁸ A similar process occurs in the context of establishing *scienter* in the keeper of a dangerous domestic animal. See *Eather v. Jones* (1975) 49 A.L.J.R. 254.

defendant: knowledge of the plaintiff, of *reliance*, of relevant transaction and of likely consequence if his conduct in carrying out his *undertaking* should prove careless or misleading.⁹⁹

III CONTROL DEVICES IN 'WEAK' SITUATIONS

Other situations apart from those of purely economic loss where the liability generating factors are 'weak', resulting in special rules for establishing a duty of care, will now briefly be considered.

In situations falling outside the straightforward case of physical harm (other than nervous shock in the form of a secondary harm) flowing from physical activities the courts have developed special rules to control liability for carelessness. These special rules are explained in part by the policy factors and considerations explored above, particularly those set out in the introductory section.

Omissions

Some conduct can be described alternatively in terms of acts or omissions.¹ Difficulties arise however where the situation is not one where the defendant's omission occurs whilst he is involved in an activity or course of conduct which poses risk to others, but is one where the claim is that he failed altogether to engage in some activity or action for the protection of the plaintiff's interests. There is indeed at common law a general reluctance to recognize liability in negligence for the consequences of omissions whether they are careless or deliberate. The stranger might stand by with impunity and watch a baby struggling helplessly in a shallow pool. However, if it is the lifeguard who stands by, he would be liable for failing to perform *a duty of positive action*. The question arises therefore of the circumstances in which the courts will recognize a duty of positive action so that there will be liability for the consequences of failing to take such action. It is submitted that these circumstances are as follows:

- (1) Where the defendant has either expressly, or impliedly by his conduct, given the plaintiff an undertaking that it is safe to rely upon him, and the plaintiff is thereby lulled into a sense of false security, the defendant will be liable for his failure to do what he has undertaken.² This device has of course been employed in another 'weak' situation, misstatements causing purely economic loss, to generate liability.

⁹⁹ See *infra* 114 ff.

¹ See Hart H. L. A. and Honoré A. M., *Causation in the Law* (1959) 131.

² *East Suffolk Rivers Catchment Board v. Kent* [1941] A.C. 74, 106 f., per Lord Porter (H.L. (E.)); *sub. nom. Kent v. East Suffolk Rivers Catchment Board* [1940] 1 K.B. 319, per Slessor L.J.; *Barnett v. Chelsea and Kensington Hospital Management Committee* [1969] 1 Q.B. 428. All these cases point to undertaking and reliance as liability generating in this area. For this concept at work in the *Hedley Byrne* context see *infra* 114 ff.

(2) Where there is a contractual or other liability or responsibility generating relationship already in existence between plaintiff and defendant, as with *e.g.* members of a family,³ employer and employee,⁴ innkeeper and guest, occupier and entrant,⁵ carrier and passenger,⁶ then there will be a duty to take reasonable steps to protect the plaintiff from risks which it is within the defendant's capacities to control.

(3) Where the defendant has created a risk of harm, whether negligently⁷ or non-negligently,⁸ he is under a duty of positive action for the reasonable protection of persons threatened by such risks.

(4) Where the defendant is an occupier of land in the neighbourhood of that occupied by the plaintiff he is under a duty to act reasonably within the limitations imposed by his knowledge, skill and resources for the protection of his neighbour.⁹

(5) Where the defendant is under a statutory *duty* to take positive steps for the protection or in the interests of the plaintiff or the class of persons to which he belongs,¹⁰ and he fails to perform that statutory duty, he may be liable *in a civil action for breach of statutory duty*,¹¹ and alternatively, irrespective of whether the legislature intended to confer a civil remedy based on the breach of a statutory duty in the event of its not being performed, he may be liable *in negligence* if his omission to act was a careless one.

(6) Where the defendant is a statutory authority with *statutory powers* to act in the interests of or for the protection of the plaintiff or the class to which he belongs then there may be liability in negligence for the careless and *ultra vires* non-exercise of such powers.¹²

Failure to control the deliberate conduct of others

Whereas the 'neighbour principle' was formulated in the context of a complaint that the defendant should have taken care to ensure that his product did not cause harm to consumers, in the area presently under discussion the claim is that the defendant should have taken care to ensure that *other people* should not inflict harm. When will the defendant

³ *Hahn v. Conley* (1971) 45 A.L.J.R. 631, *per* Menzies and Walsh JJ. (dissenting on the facts). McTiernan and Windeyer JJ. recognized that the relationship of grandparent and grandchild *might* be the source of a general duty to take positive action but found no evidence of negligence; *contra*: Barwick C.J., *ibid.* 635.

⁴ *Horsley v. MacLaren* [1971] 2 Lloyd's Rep. 410 (Supreme Court of Canada).

⁵ *Woodward v. Mayor of Hastings* [1945] K.B. 174 (C.A.).

⁶ *Horsley v. MacLaren* [1971] 2 Lloyd's Rep. 410 (Supreme Court of Canada).

⁷ *Connolly v. Grenier* (1909) 42 S.C.R. 242.

⁸ Although this is doubtful. See *Johnson v. Rea Ltd* [1962] 1 Q.B. 373 (C.A.) and the discussion of this question in *McKinnon v. Burtatowski* [1969] V.R. 899.

⁹ *Goldman v. Hargrave* [1967] 1 A.C. 645 (P.C.).

¹⁰ *Bonnington Castings Ltd v. Wardlaw* [1956] A.C. 613 (H.L. (Sc.)).

¹¹ An action conceptually distinct from that for negligence: *London Passenger Transport Board v. Upson* [1949] A.C. 155, 168, *per* Lord Wright (H.L. (E.)).

¹² *Anns* [1978] A.C. 728 (H.L. (E.)).

be under such a duty? In the related area of omissions liability depends upon establishing a pre-existing link between plaintiff and defendant which would be such as to justify the imposition of a duty to act to prevent foreseeable harm. In the area of control duties the courts have also been concerned with such links between the defendant and a third person as would justify the conclusion that the defendant's omission was a *cause* of the injury or damage deliberately inflicted on the plaintiff by the third person and that in addition the defendant was to an extent to blame for this damage. That link is clearly provided by the existence of a *legal* power to control arising out of a *custodial* relationship between the third person and the defendant. Examples include the parental relationship,¹³ the relationship between pupil and teacher¹⁴ and pupil and education authority,¹⁵ the relationship between prisoner and prison authority,¹⁶ the relationship between a mentally ill or retarded person and the institution¹⁷ or person¹⁸ to which such person has been committed, and even control of the general situation when involved in activity with a joint venturer¹⁹ (again, a significant use of this concept in yet another context).

But in addition to a custodial relationship between the defendant and a third party, a pre-existing liability or responsibility generating relationship between defendant and victim of the kind discussed in relation to omissions might be sufficient for the establishment of a duty to control or to take reasonable measures to protect against deliberate conduct of a third person.²⁰ Thus, liability has been imposed on the employer of a plaintiff who was attacked and injured whilst on his way to deposit his employer's takings at the bank. The employer's duty of care for the protection of his employee extended to protection from the foreseeable risk of felonious attack whilst he was on duty.²¹ On the other hand, the duty of the employer does not extend to protection of the employee's goods against theft by outsiders from the place where the employee is instructed to work.²² So also, an occupier is not liable without more for failure to take positive steps to protect goods left on his premises with his permission by the plaintiff.²³ For there to be liability in a defendant who has failed to

¹³ *Smith v. Leurs* (1945) 70 C.L.R. 256.

¹⁴ *Richards v. State of Victoria* [1969] V.R. 136 (F.C.).

¹⁵ *Geyer v. Downs* (1977) 52 A.L.J.R. 142.

¹⁶ *Home Office v. Dorset Yacht Co. Ltd* [1970] A.C. 1004 (H.L. (E)).

¹⁷ *Holgate v. Lancashire Mental Hospitals Board* [1937] 4 All E.R. 19.

¹⁸ *Morriss v. Marsden* [1952] 1 All E.R. 925.

¹⁹ *Brooke v. Bool* [1928] 2 K.B. 578 (D.C.). This has been an important concept in generating liability in other 'weak' areas, e.g. nervous shock, *infra* 101 n. 34, and purely economic loss when it takes the form of a secondary harm, *infra* 102 ff.

²⁰ Thus, the hotel proprietor may owe a duty to protect his guests from assaults by intruders.

²¹ *Benedetto v. Campsie Freeholds Pty Ltd* (1968) 89 W.N. (Pt. 1) (N.S.W.) 344.

²² *Deyong v. Shenburn* [1946] K.B. 227 (C.A.).

²³ *Tinsley v. Dudley* [1951] 2 K.B. 18 (C.A.); *Morris v. C.W. Martin & Sons Ltd* [1966] 1 Q.B. 716, 725, *per* Lord Denning M.R.

take reasonable steps for the protection from theft of or malicious damage to goods belonging to the plaintiff, the defendant must expressly or impliedly have given an *undertaking* to the plaintiff that he would look after the goods and the plaintiff must have *relied* upon that undertaking;²⁴ alternatively, there must have been a contract between the parties to take care for the protection of the goods²⁵ or the situation must have been one of bailment for reward.²⁶ In these situations the theft or malicious damage which intervened was the very thing which it was the defendant's duty to guard against. In this area we see the employment of the kind of liability generating device used in *Hedley Byrne*, another 'weak' situation, namely undertaking and reliance.

In *Dorset Yacht* Lord Reid said:²⁷

Where human action forms one of the links between the original wrong-doing of the defendant and the loss suffered by the plaintiff, that action must at least have been something very likely to happen if it is not to be regarded as *novus actus interveniens* breaking the chain of causation. I do not think that a mere foreseeable possibility is or should be sufficient.

His Lordship was there alluding to the difficult problems of causation involved in attributing liability for deliberate conduct to those who have failed to control it. For example, if a person convicted of rape on several occasions were to be placed in a minimum security Prison Department farm pursuant to a policy of rehabilitation, and if he were to be afforded the opportunity of escape because of lax security in breach of Departmental instructions and were to decide to take that opportunity, there is a likelihood that he might use violence to steal a vehicle to effect his getaway; and once at large there is a possibility that he might trick the local publican into providing him with a meal, rape the publican's daughter, escape to the city and two years later still undetected again commit rape. On the cases, it could only be stated clearly that there would be civil liability imposed on the Department for the theft of the vehicle and the violence to its owner. Whether the limitations on the Department's liability in the subsequent situations be expressed in terms of absence of duty, failure of causation or remoteness, it is clear that a much higher degree of probability is required before recovery will be allowed in such situations than would be conceded by the neighbour principle, both in relation to 'class likely to be affected' and 'kind of damage to be expected'.²⁸

²⁴ *Morris v. C.W. Martin & Sons Ltd* [1966] 1 Q.B. 716 (C.A.), and *Ashby v. Tolhurst* [1937] 2 K.B. 242 (C.A.), where such an undertaking had not been given. Again, we see undertaking and reliance as a liability generating device in a 'weak' situation. Cf. its operation in the context of negligent misstatement, *infra* 114 ff.

²⁵ As was found in *Stansbie v. Troman* [1948] 2 K.B. 48 (C.A.); see also *Morris v. C.W. Martin & Sons Ltd* [1966] 1 Q.B. 716, 726 f., per Lord Denning M.R.

²⁶ *Morris v. C.W. Martin & Sons Ltd* [1966] 1 Q.B. 716 (C.A.).

²⁷ [1970] A.C. 1004, 1030 (H.L. (E.)).

²⁸ *Ibid.* 1068 f., per Lord Diplock.

*Nervous shock*²⁹

Nervous shock generally takes the form of a secondary harm suffered at the shock of witnessing or learning of the effects of the defendant's carelessness on its immediate victim. The courts have been traditionally reluctant to allow recovery in respect of such harms for reasons reviewed in the first section. It is instructive to compare the rules in this area with those controlling recovery for purely economic loss where it takes the form of a secondary harm as was the case in *Caltex*. While foreseeability of nervous shock is in all cases a necessary condition for recovery in negligence, it is not always sufficient. Where nervous shock is suffered as a secondary harm other factors dictated by policy requirements³⁰ must be present in the circumstances before recovery will be allowed. The plaintiff must at least have been in the disaster area, either as a matter of space or time.³¹ But even where this temporal-spatial factor (strongly reminiscent of the 'joint venture' factor in the *Caltex* formula³²) is satisfied, claims for recovery in respect of nervous shock have been successful only where there was something special in the circumstances, as where, to name the most obvious: (a) there was a special relationship between plaintiff and defendant such as employer and employee³³ (this could no doubt be extended to visitor and occupier and carrier and passenger); (b) plaintiff and defendant were joint venturers;³⁴ (c) there was a special relationship between plaintiff and victim such as a family relationship.³⁵ Where nervous shock is suffered as a secondary harm, then only in these circumstances will the relationship between the careless defendant and the plaintiff who

²⁹ I am indebted to Weir, *op. cit.* 37 in respect of the analysis contained in this section.

³⁰ See *Pratt v. Pratt* [1975] V.R. 378 (F.C.).

³¹ *Ibid.* 391, per Starke J., citing *Hambrook v. Stokes Bros* [1925] 1 K.B. 141 (C.A.); *Bourhill v. Young* [1943] A.C. 92 (H.L. (Sc.)); *Chapman v. Hearse* (1961) 106 C.L.R. 112; *Mount Isa Mines Ltd v. Pusey* (1970) 125 C.L.R. 383. Where the plaintiff is actually involved in an accident with a relative but learns only later at the hospital of the death of the relative, at that point suffering the onset of mental or nervous injury at the shock of news, there is the necessary contemporaneity and there will be recovery: *Andrews v. Williams* [1967] V.R. 831 (F.C.). Here, 'within the limits of foresight something is experienced through direct and immediate perception of the accident, or some part of the events constituting it': *Benson v. Lee* [1972] V.R. 879, 881, per Lush J. *Storm v. Geeves* [1965] Tas. S.R. 252, 264 is to like effect.

³² *Infra* 110 ff.

³³ E.g. *Dooley v. Cammell Laird* [1951] 1 Lloyd's Rep. 271; *Mt Isa Mines Ltd v. Pusey* (1971) 125 C.L.R. 383 (which also satisfies (c) set out in the text).

³⁴ *Boardman v. Sanderson* [1964] 1 W.L.R. 1317 (C.A.), where, it is submitted, the 'joint venture' factor was significantly present.

³⁵ E.g. *Hambrook v. Stokes Bros* [1925] 1 K.B. 141 (C.A.); *Storm v. Geeves* [1965] Tas. S.R. 252 (mother and little brother each with psychological make-up contributing to severe reaction); *Hinz v. Berry* [1970] 2 Q.B. 40 (C.A.) (wife and mother); *Richters v. Motor Tyre Service Pty Ltd* [1972] Qd. R. 9 (wife). And contrast *Bourhill v. Young* [1943] A.C. 92 (H.L. (Sc.)) where the plaintiff, although satisfying the requirement set out *supra* n. 31 was not within any of the special situations set out in the text justifying recovery in respect of nervous shock as a secondary harm.

has suffered nervous shock be regarded as a 'proximate' one³⁶ and thus the subject of a duty of care.³⁷

IV PURELY ECONOMIC LOSS: THE GROUND RULES FOR RECOVERY IN NEGLIGENCE

A ECONOMIC LOSS FLOWING FROM PHYSICAL HARM TO PROPERTY

Consequential economic loss

There are few difficulties standing in the way of recovery by the plaintiff of an economic loss which flows from damage to his property. Such loss is not 'pure' but is consequential upon property damage, so that where the defendant was under a duty to take care not to damage the property economic losses which flow therefrom will *prima facie* be recoverable subject to the difficult and complex rules relating to remoteness of damage. Recoverability of consequential economic loss is thus controlled by remoteness, not duty.

Remoteness of consequential economic loss

The question of remoteness of damage is beyond the scope of this article. However, it is instructive to raise a remoteness case, *The Edison*,³⁸ which illustrates the potency of a factor operating also in the context of duty when used as a control on purely economic claims, namely the reluctance of the courts to allow recovery in respect of a merely careless interference with one's economic relationships with others. In *The Edison* the plaintiff's claim for economic loss consequential upon the sinking by the defendants of their dredger included the extra cost of hiring at an exorbitant rent the substitute that they could not afford to buy. The history of the case is given in *The Edison (No. 2)* by Scrutton L.J., his Lordship pointing out that the claim was made up on the basis:

We are very poor, consequently we cannot do what a rich man would have done, and so we have had to make a series of elaborate and expensive arrangements of finance, in order to carry out our harbour contract.³⁹

The House of Lords refused to allow recovery of any loss which arose from the plaintiff's impecuniosity, putting the decision on the basis of causation or remoteness.⁴⁰ But it is difficult to see how this sits with the 'egg-shell skull' and 'shabby millionaire' rules.⁴¹ It is apparent however that to have allowed recovery for such extra costs would have offended against the admonition, recently described as seminal by Jacobs J. in the

³⁶ *Pratt v. Pratt* [1975] V.R. 378 (F.C.).

³⁷ But cf. *Mt Isa Mines v. Pusey* (1971) 125 C.L.R. 383, 393.

³⁸ *Liesbosch, Dredger v. Edison S.S. (Owners)* [1933] A.C. 449 (H.L. (E.)).

³⁹ (1934) 151 L.T. 279, 281.

⁴⁰ [1933] A.C. 449, 460 f. (H.L. (E.)).

⁴¹ See Street H., *The Law of Torts* (6th ed. 1976) 147 f.

Caltex case,⁴² against using one's contractual relationships with others as anything more than a measure of the loss of earning capacity generated by physical harm to one's person or property. It is submitted that this is the true explanation of the case. Where physical harms have been tortiously inflicted, the task of the court includes that of valuing the person or property affected. This is a complex matter. Where an economic asset is destroyed, as was the case in *The Edison*, an important head of damage will be *loss of earning capacity*. It is not loss of earnings which is recoverable. Damages are given for loss of earning capacity.⁴³ The sums which might have been earned and the profits which might have been made enable this capacity to be quantified. 'The actual loss of profit may be evidence of the profitability of the affected property',⁴⁴ but it is no more than evidence. Thus, while such damages as loss of earnings (from personal injury) and loss of profits (from property damage) might appear to be 'damages arising out of a relationship with a third party', they in fact are not. Where the economic loss arises in this way, *i.e.* out of a relationship with a third party,⁴⁵ it is irrecoverable. There are, as has been already noted, good reasons for this rule.

Although purporting to, the plaintiffs in *The Edison* were not in fact claiming to have the earning capacity of their lost dredger assessed. They were in essence making a quite distinct and purely economic claim. They were saying that, owing to the defendant's tortious act in depriving them of their dredger in the context of very heavy contractual commitments to others in which their existing wealth was committed, they were forced to enter further even more disadvantageous contractual relationships, thereby attracting additional creditors and further depletions of wealth. There could be no clearer instance of damage arising out of economic relationships with third parties, and recovery of it in *The Edison* would clearly have offended against the base rules for such recovery. Indeed, there would appear to emerge from *The Edison* a corollary to the basic rule relating to recovery in negligence for purely economic loss that economic loss arising by way of loss of the benefit of a contract with a third party will be irrecoverable, the corollary being that while expenses incurred to avoid such loss of benefits *will* be recoverable,⁴⁶ where such expenses in fact take the form of 'arrangements of finance', they will not. In other words, economic losses taking the form of *loss of benefits from contracts with others anticipated by the plaintiff*, or taking the form of *additional burdens from contracts with others forced upon the plaintiff* to secure such anticipated benefits, are irrecoverable in negligence.

⁴² (1976) 136 C.L.R. 529, 598.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ A rule now established by the *Caltex* case (1976) 136 C.L.R. 529.

Recoverable consequential economic losses

As indicated by *The Edison*, the plaintiff will recover foreseeable⁴⁷ economic losses flowing directly from foreseeable damage to his property, as where the defendant carelessly damages C's property, thereby cutting off electric power to the plaintiff's machines and damaging the equipment and materials, so that loss of production ensues. Such foreseeable financial losses are *consequential* upon foreseeable injury or damage to the plaintiff's person or property and form a long established and well-recognized area of recovery for economic losses. Thus, in *Spartan Steel and Alloys Ltd v. Martin & Co. (Contractors) Ltd*⁴⁸ the plaintiff had no difficulty in recovering in respect of the physical damage to the material which was in the process of being melted, *i.e.* the depreciation in value, together with the profit on the particular melt in the process of completion. Such loss was consequential on the physical damage. Their claim for loss of profits on the melts which might have been put through in the time during which the foundry was deprived of power was however refused. This loss was purely economic and would remain irrecoverable even under *Caltex*.⁴⁹

The proprietary interest necessary to make an economic loss consequential

Where the plaintiff has some proprietary or possessory interest in a chattel or other property damaged by the defendant's negligence, economic losses flowing therefrom may be recoverable on the ground that they are not purely economic but 'consequential'. Such interests extend to 'immediate or reversionary property' rights and 'possessory' rights 'by reason of any contract itself attaching to the chattel, such as by lien or hypothecation'.⁵⁰ Thus, in the case of a collision on the high seas the charterer of a ship on a time charter (as opposed to a charter by demise) cannot recover in respect of the damage to the ship or for loss of use during repairs.⁵¹ In the *Caltex* case there would have been no difficulty in

⁴⁷ It is questionable whether on principle a consequential harm must be foreseeable to be recoverable. If it was *caused* by physical harm to the plaintiff's person or property and that *initial* harm was foreseeable then there should be no bar to recovery, provided that if it is a 'loss of profit' on a contract with a third party it measures the damage to the person or property initially inflicted. See *ibid.* 598. In any event, where physical harms occur, consequential economic losses are invariably foreseeable, the question becoming one of quantification: *Dutton v. Bognor Regis U.D.C.* [1972] 1 Q.B. 373 (C.A.). *A fortiori* with consequential nervous shock. For examples see *British Celanese Ltd v. A.H. Hunt (Capacitors) Ltd* [1969] 1 W.L.R. 959; *S.C.M. (United Kingdom) Ltd v. W.J. Whittall & Son Ltd* [1971] 1 Q.B. 337 (C.A.).

⁴⁸ [1973] Q.B. 27 (C.A.).

⁴⁹ See *infra* 110 n. 88. The case has also clearly exploded the theory in *Seaway Hotels Ltd v. Cragg (Canada) Ltd* (1959) 21 D.L.R. (2d) 264 (Ont. C.A.) that purely economic loss not consequent upon damage to the plaintiff's property can be claimed as 'parasitic'.

⁵⁰ *Simpson v. Thomson* (1877) 3 App. Cas. 279, 289 f., *per* Lord Penzance (H.L. (Sc.)).

⁵¹ *Chargeurs Réunis Compagnie Française v. English and American Shipping Co.* (1921) 9 Ll.L.R. 464 (C.A.).

the way of recovery even for loss of profits sustained during the period of disruption and partial immobilization if the plaintiffs had enjoyed some kind of proprietary or possessory interest in the damaged pipeline. But they had no such interest.⁵²

Lessons to be learned from the Caltex decision

There is thus a very important message implicit in the *Caltex* case for the legal advisers of persons engaged in joint ventures involving use by the joint venturer of profit-generating equipment belonging to another. The message is to insure the profit and advantage which one might expect to gain from using this plant, equipment or facility by the simple expedient of obtaining in the agreement establishing the joint venture some title thereto. The terms of such an agreement will be decisive as to title.⁵³ Failure to obtain it, even since the *Caltex* case with its slightly more generous rules relating to purely economic (as opposed to consequential economic) recoveries, could prove financially disastrous, particularly if the purely economic claim were to run foul of the knowledge requirement stressed in that case or if it were to take the form of a loss of profit on collateral commercial arrangements adversely affected as opposed to an expense incurred in adopting alternative arrangements.⁵⁴

Preventing the occurrence of physical harm and consequential economic loss

In the *Anns* case⁵⁵ the House of Lords opened the door to recovery of a wide range of purely economic losses by the expedient of classifying the harm caused by the defendant in that case, the local council, as 'physical'. But the essence of liability in the new duty category developed in *Anns* and the essence of the harm caused by the defendant subject to the duty is the creation of a situation whereby the purchaser of a chattel⁵⁶ or structure is likely to be misled into making a bad bargain. The inspector does not *cause* the chattel or structure to be defective. Someone else (the manufacturer or builder) has already done that. Rather the inspector causes the defect to go undetected by the plaintiff. Recovery is limited to situations where, if the chattel or structure were not repaired, it would pose a threat of imminent physical harm to others.⁵⁷

⁵² (1976) 136 C.L.R. 529, 559 f., per Stephen J.

⁵³ *Ibid.*

⁵⁴ *Ibid.* 577, per Stephen J.

⁵⁵ [1978] A.C. 728, 759 f., per Lord Wilberforce (H.L. (E.)).

⁵⁶ There seems no reason to distinguish between chattels and structures for the purposes of the rule in that case. See *infra* 107 n. 68.

⁵⁷ [1978] A.C. 728, 759 f., per Lord Wilberforce (H.L. (E.)). While there is a suggestion that damages are limited to the cost of averting imminent physical harm, more than such limited damages were recovered in *Bowen v. Paramount Builders (Hamilton) Ltd* [1975] 2 N.Z.L.R. 546; and in *Batty v. Metropolitan Property Realisations Ltd* [1978] Q.B. 554 (C.A.) loss of value was the measure used.

The duty to mitigate and the privilege to prevent damage

In *Anns* the House of Lords also recognized that builders could be rendered liable in negligence to purchasers of defective structures. The decision in *Anns* on this question is a logical deduction from the normal conception of the duty to mitigate. In certain situations in both tort and contract the plaintiff will be under a duty to mitigate his loss.⁵⁸ It is a well-established principle that where the plaintiff takes reasonable steps to minimize his loss he can recover for harm sustained by him or expenses incurred⁵⁹ in the course of taking this defensive action⁶⁰ irrespective of whether his total loss would have been less had he not acted at all. A result of *Anns*⁶¹ is, in effect, to establish that if that defensive action should be taken *before* the occurrence of the threatened harm — in anticipation of its occurrence and to prevent or reduce its effects — the expenses are recoverable under an extension of that principle. If a person's private resort beach is threatened by an oil spill in a bay, must he wait until the threatened tort is committed,⁶² *i.e.* until the slick is washed ashore, driving away guests, or should he be entitled to take immediate evasive action by temporarily removing the sand and replacing it once the oil slick has come to rest?⁶³ It takes only a minor extension of the general and well-accepted principles relating to mitigation to achieve this result, and this is effectively what in a different factual setting *Anns* has done.

These new principles were to an extent anticipated by a minority of judges in a recent Canadian case, *Rivtow Marine Ltd v. Washington Iron Works*.⁶⁴ In that case the defendants, a manufacturer and a supplier who had put a motorized crane on the market and subsequently become aware that it was defective, failed to warn the plaintiff company, which was using the crane in its logging business, of the defect. The plaintiff sustained two kinds of purely economic loss: the cost of repairing the product and the loss of profit flowing from the failure to give timely warning, such failure resulting in the plaintiff losing the use of the defective crane during the busy season. Recovery in respect of the first item was refused by the majority.⁶⁵ (All judges recognized that the second item was recoverable under the *Hedley Byrne* principle). The majority in *Rivtow Marine* disallowed the cost of repair on the ground that while this item would have been allowed had there been a contract between the manufacturer and consumer and an express or implied warranty of fitness, a tort remedy could not, in the absence of privity, be used to fill the gap.⁶⁶ In other

⁵⁸ Fleming, *op. cit.* 235 f.

⁵⁹ See *Kirkham v. Boughey* [1958] 2 Q.B. 338, 342, *per* Diplock J.

⁶⁰ *The Oropesa* [1943] P. 32 (C.A.).

⁶¹ [1978] A.C. 728 (H.L. (E.)).

⁶² *E.g.* the tort of public nuisance.

⁶³ As was done recently by French authorities when the coastline was threatened by oil-spill during the tourist season.

⁶⁴ (1973) 40 D.L.R. (3d) 530 (Supreme Court of Canada).

⁶⁵ Laskin and Hall JJ. dissenting on this question.

⁶⁶ (1973) 40 D.L.R. (3d) 530, 541.

words, the manufacturer or supplier under a duty of care for the protection of consumers of his product (and, on this analysis, the builder of a defective structure) is not liable *in tort* for damages occasioned by the fact that the product (or structure) is *less valuable* than it would have been had the duty of care been complied with and the product (or structure) put on the market in as sound a condition as reasonable care could make it.

It has now been established however that 'damage to the dwelling-house itself'⁶⁷ (and presumably also to the defective chattel itself) is an allowable head in a negligence action against the builder and local government authority (and against the manufacturer and supplier of a defective chattel) in the newly developing area of liability for defective structures. The approach of Lord Wilberforce in the *Anns* case is very similar to that adopted by the minority in *Rivtow Marine* in recognizing the cost of repair to a defective product as a legitimate head of damage. Their approach emphasizes the principle that costs of mitigating damage are already recoverable in a tort action and it seems that this will probably become the law in England and Australia.⁶⁸

There are indeed three factors present in the kind of situation arising in *Rivtow Marine* which render safe the prediction that the *minority* approach to the cost of repair will be adopted: (1) the plaintiff is after all suing in negligence, and the initial liability is not strict as it is where there is a contract; (2) the existence of a well-established duty to mitigate makes the minority's extensions of liability for economic loss slight; and (3) this kind of damage has in any event been classified in the *Anns* case in the context of liability for defective structures as 'physical' not 'economic'.

Purely economic loss

The above situations do not however exhaust the circumstances in which carelessly caused economic losses are recoverable. Even where the loss is purely economic, flowing as a secondary harm from interference with the property of a third party, it may nevertheless be recoverable in negligence in certain circumstances. One such set of circumstances was described in various ways by the members of the High Court in the *Caltex* case, but the minimum principle of liability established by that case would seem to be as follows: Where the defendant is under a duty of care⁶⁹ for the protection of property of a third party on which to his knowledge, actual

⁶⁷ *Anns* [1978] A.C. 728, 759 f., *per* Lord Wilberforce. However, actual physical damage need not have occurred. In principle all that is necessary is that it should have been foreseeable. See *supra* 105 f. nn. 57-63.

⁶⁸ Lord Wilberforce, *ibid.*, expressly endorsed the dissenting judgment of Laskin J. in *Rivtow Marine* (1973) 40 D.L.R. (3d) 530, where his Honour applied such a principle to defective chattels.

⁶⁹ (1976) 136 C.L.R. 529, 555 f., *per* Gibbs J.; 576 f., *per* Stephen J.; 593 f., *per* Mason J.

or constructive,⁷⁰ the plaintiff is economically dependent,⁷¹ and he breaches his duty so as to damage that property and disturb that dependence, he is liable for the economic detriment (*as opposed to loss of profit arising from disruption of collateral commercial arrangements*)⁷² which he knows or has means of knowing will flow to the plaintiff therefrom.⁷³

Purely economic losses are also recoverable in the circumstances of *Morrison S.S. Co. Ltd v. Greystoke Castle (Cargo Owners)*.⁷⁴ The rule in the *Greystoke Castle* case may be stated as follows: When a collision of ships at sea is caused by the defendant's negligent navigation, and undamaged cargo in the negligently damaged ship is being carried pursuant to a joint venture involving the respective owners, the cargo owners are entitled to recover from the defendant the purely economic losses (such as, in the *Greystoke Castle* case itself, liability to general average contribution) directly flowing therefrom.

Possible future extensions of the rules in the Caltex and Greystoke Castle cases

Two members of the majority in the *Greystoke Castle* case,⁷⁵ Lords Roche and Porter, discussed a hypothetical problem of considerable interest in the context of any review of *Caltex*, namely whether the owner of goods in lorry A, who is put to financial expense as a result of its being involved in a collision caused by the negligence of the driver of

⁷⁰ *Ibid.* 555, per Gibbs J., in a passage discussed *supra* 96 n. 97; 577 f., per Stephen J.: 'the defendants, when the dredging operations were in progress, *must be taken to have known* that carelessness in those operations, causing injury to the pipelines, would affect Caltex in precisely the way it did. . . . "They both knew, or had the means of knowing, that the pipeline led from the refinery to the terminal. Its fracture would obviously involve the very kind of disruption and consequent expense for which Caltex sues."' (Emphasis supplied); 593 f., per Mason J.

⁷¹ A.O.R. owned the pipeline. Its agreement with Caltex provided that if Caltex exercised the option of delivery by pipeline oil was to be delivered 'at the boundary fence of the terminal, by pipeline, and shall be pumped into such . . . terminal at A.O.R.'s expense': *ibid.* 559. Property in the oil never left Caltex, the transaction being one of bailment: *ibid.* 561. See *ibid.* 603 f. for an account of the extent of their interdependence.

⁷² In *Caltex* the claim was for the expense of making alternative transport and delivery arrangements, which included the expense of modifying the terminal: *ibid.* 593. See also the warnings *ibid.* 577, per Stephen J.; 599, per Jacobs J.

⁷³ It seems that 'means of knowing' encompasses the notion (as it came to do in the area of the occupier's liability to his licensee) of knowing (or possessing the means of knowledge) of facts on the basis of which the reasonable man would recognize the existence of the relevant danger: in the case of occupiers' liability the existence of a 'concealed trap' on his land; in the purely economic loss situation the inevitability of economic loss of the kind which in fact occurred if the property of a third party should be damaged. Thus we have a concept whereby 'knowledge' is established if the defendant had in his possession or awareness certain facts from which he would have been negligent in failing to make a conclusion as to the fact in issue. Thus, whether he did or did not in fact make that conclusion he is taken to have done so. The next step would be to hold that *even though he did not know the initial framework of facts from which the conclusion might have been drawn*, he will be taken to have known of these if he was negligent in not discovering their existence.

⁷⁴ [1947] A.C. 265 (H.L. (E.)).

⁷⁵ [1947] A.C. 265, 280, per Lord Roche; and, less clearly, 296 f., per Lord Porter (H.L. (E.)).

lorry B, would be entitled to damages. Each of their Lordships would regard the owner of lorry B as liable for the purely economic losses caused to the owner of the undamaged goods by the driver's negligence, invoking in justification the concept of involvement in a joint venture.

The use of the joint venture concept in the *Greystoke Castle* case has been much criticized.⁷⁶ Yet it has been present in other cases where liability has been imposed notwithstanding the 'weakness' of the situation, in particular in the areas of nervous shock as a secondary harm and of omissions.⁷⁷ There are in addition decisions such as *Main v. Leask*,⁷⁸ a case involving a collision between fishing boats, one of which (the *Gratitude*, which was sunk, but held not at fault) was being worked under an agreement whereby the profits were divisible among its owners, the owners of the nets (certain members of the crew) and the crew in certain proportions. An action was brought by the owners and the crew against the owners of the vessel at fault, the claims including one for the loss of profits which the pursuers estimated they would have made during the remainder of the fishing season. Lord Ardwell viewed the case as one of a joint venture to which the owners contributed the vessel which was sunk and the crew their services and in some cases their fishing gear:

... the members of the crew each suffered a direct and immediate loss through the sinking of the *Gratitude*, that loss being the share of the profits of the joint adventure in which they were engaged, which loss was directly caused by the fault of the defenders. I am accordingly unable to adopt the view that before the facts are ascertained it ought to be held that the claim of the crew is barred by reason of its remoteness or consequential nature. (Emphasis supplied).⁷⁹

Main v. Leask is thus very close to the *Caltex* situation. In each case the plaintiff is economically dependent on the continued viability of the property of a third party. In each there is a duty not to damage it which has been breached by the defendant. In the *Caltex* situation there is knowledge of reliance and potential economic consequence. In the *Main v. Leask* situation there is no knowledge, but the plaintiff is physically present on the scene and is involved at the time of the accident in a joint venture with the third party. In each of these situations a powerful liability generating factor — in the first knowledge, in the second physical participation in a joint venture — was used to bridge the gap created by the absence of any proprietary or possessory interest in the property actually affected. There is no necessary logic in using 'knowledge' or the 'joint venture' concept as a device for determining when a person may or may not sue for a purely economic loss flowing from damage to the property of a third person. But neither is there logic in any of the other control devices operative in the negligence area and employed to establish

⁷⁶ See Atiyah P. S., 'Negligence and Economic Loss' (1967) *Law Quarterly Review* 248.

⁷⁷ See *supra* 99 n. 19 (omissions) and 101 n. 34 (nervous shock).

⁷⁸ 1910 S.C. 772.

⁷⁹ *Ibid.* 778 f.

proximity between plaintiff and defendant, in particular foreseeability. Such devices simply reflect the need in certain areas to draw the line for policy reasons. If a reason must be found for choosing 'knowledge' or 'joint venture' rather than some other device, then it will be found in the history of the common law and by means of a knowledge and understanding of the kinds of mental states, activities, relationships and 'things' which have always attracted the attention of the courts as for one reason or another being special.

In the general area of carriage of goods, however, it remains clear that the consignee of the goods being carried cannot recover damages caused by the delay in carrying them;⁸⁰ that the owner of other goods cannot recover damages because the vehicle or vessel is unable to carry them on its return journey;⁸¹ that a ship-owner and time charterer are not joint venturers for the purposes of the rule;⁸² and that a time charterer⁸³ who puts his own goods on the vessel can recover for purely pecuniary loss but a charterer who has put someone else's goods on board cannot.⁸⁴ It is also clear that the joint venture concept has not as yet been used to override the general rule denying recovery for economic loss caused to the plaintiff by the death of or injury to a third person, the only exceptions being where the *actio per quod servitium amisit* can be brought⁸⁵ and under Lord Campbell's Act:⁸⁶ although the pedigree of the limitations on recovery at common law in respect of economic losses flowing from the death of another is distinctly suspect.⁸⁷

The 'joint venture' concept

In their judgments in the *Caltex* case both Gibbs and Stephen J.J. emphasized the joint venture aspects of the *Greystoke Castle* case;⁸⁸ Gibbs J. also made mention of this aspect of *Main v. Leask*,⁸⁹ which was indeed one of the cases from which his Honour derived the general proposition formulated for the resolution of the case.⁹⁰ Stephen J. did not regard the joint venture concept developed in the *Greystoke Castle* case

⁸⁰ *Caltex* (1976) 136 C.L.R. 529, 548, per Gibbs J.

⁸¹ *Ibid.*

⁸² *Chargeurs Réunis Compagnie Française v. English and American Shipping Co.* (1921) 9 Ll.L.R. 464 (C.A.).

⁸³ A time charterer would then be involved in a joint venture because his property (his goods) and that of his joint venturer (the ship owner) would be at risk from a single act of negligence.

⁸⁴ Atiyah, *op. cit.* 256 n. 27 points out however that if he has contracted to carry them as principal the charterer would be bailee of the cargo and the shipowners sub-bailees, so that the charterer would have a possessory interest in the cargo: *The Okehampton* [1913] P. 54.

⁸⁵ Fleming, *op. cit.* 641-4, 672-6; *Caltex* (1976) 136 C.L.R. 529, 546, per Gibbs J.

⁸⁶ Fleming, *op. cit.* 648 ff.; *Caltex* (1976) 136 C.L.R. 529, 546, per Gibbs J.

⁸⁷ Fleming, *op. cit.* 647 f. Might it not after *Caltex* be overridden in joint venture situations?

⁸⁸ (1976) 136 C.L.R. 529, 547, per Gibbs J.; 571, per Stephen J.

⁸⁹ *Ibid.* 547.

⁹⁰ *Ibid.*

as 'a reference to the technical doctrine of general average contribution'.⁹¹ His Honour thought that the doctrine applied equally to collisions on land. The authoritative nature⁹² of the hypothetical lorry collision example and its close analogy to the facts in *Caltex* were central to his Honour's reasoning leading to the plaintiff's recovery:⁹³

If for Lord Roche's lorry there be substituted A.O.R.'s pipelines across Botany Bay, the consequence of the defendant's conduct is . . . to abort the transport of the goods and as a direct consequence to involve the plaintiff in economic loss. The precise nature of that loss differs only because the lorry has but a finite capacity per trip whereas the pipelines possess an infinite capacity so long as the flow through them continues; accordingly different practical consequences follow the disablement of these respective modes of transport but the problem for the goods owner is the same, how now to move his goods. In the case of the lorry it must be unloaded and the goods loaded onto another lorry and carried to their destination; according to Lord Roche the goods owner may recover from the defendant the cost of unloading and reloading and, if the risk of interruption of the carriage rested with the goods owner, also the cost of on-carriage on the new lorry.⁹⁴

Indeed, the factual analogy became very close in his Honour's mind when one assumed that in the *Greystoke Castle* case hypothetical

[T]he lorry which the defendant disabled was, to his knowledge, the only available one suitable for carriage of the plaintiff's goods. . . . In the present case it was necessary to stop the continuity of flow through the pipelines, leaving undelivered *Caltex*'s product still at the refinery, as would have been the goods had they been unloaded from the lorry and left on the roadside for want of any other suitable lorry.⁹⁵

In both situations a degree of proximity⁹⁶ existed which was enhanced in the *Caltex* case by the fact that the defendant knew that the pipelines were and could be employed for no other purpose than the carriage of oil to the plaintiff's premises. The fact that in the *Greystoke Castle* case hypothetical

the goods . . . were already *en route* and were not, as in the case of *Caltex*'s undelivered oil, vainly awaiting carriage on second and subsequent trips by the now disabled lorry does not . . . serve as a distinguishing factor: it is but a consequence of the infinite and continuous carrying capacity of a pipeline as compared with the finite and periodic capacity of a lorry.⁹⁷

Thus we find in the *Caltex* case the joint venture concept being employed by two of the three justices adopting the 'knowledge of economic interdependence' approach. Mason J., who was also privy to this general approach, was content to remark that the *Greystoke Castle* case and its 'celebrated example' indicated that 'there was no absolute rule inhibiting the recovery of pure economic damage for negligence'.⁹⁸

⁹¹ *Ibid.* 571.

⁹² *Ibid.* 579.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *Ibid.* 580.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.* 585.

'Joint venture' defined

The concept of the joint venture would clearly seem to extend to the movement of the plaintiff's goods or product by means of a facility belonging to a third party, upon the continued viability of which each is economically dependent, where the commercial operations of each are interdependent and where a single act of negligence on the part of the defendant would pose a more or less equal threat of damage to facility and product alike.

Loss of profit where joint ventures are disrupted

Although basing his reasoning in *Caltex* strongly on the joint venture element in that case,⁹⁰ Stephen J. was at pains to point out that in both the *Greystoke Castle* case and *Caltex* the plaintiffs were not seeking (and in fact did not recover) damages representing 'some loss of profits arising because collateral commercial arrangements are adversely affected'.¹ And yet one of the major risks where a joint venture is disrupted is that profits under contracts between the plaintiff and the third party whose property has been damaged will be lost. These were recovered in *Main v. Leask*² and it is submitted that the decision on this point is likely to be explicitly endorsed at some time in the future in Australia. Profits expected under a contract which is central to the joint venture between the plaintiff and the third party and which provide that venture with its *raison d'être* might, if lost, be regarded as 'the quite direct consequence of the detriment suffered'.³ In the *Greystoke Castle* case⁴ the purely economic loss in question was a *penalty* imposed under the contract establishing the joint venture. The jump required to allow profits lost under such a contract would not be very great. If this seems to run counter to the rule against recovery of loss of profits *per se* where advantageous economic relationships are disrupted⁵ (as opposed to their use as a measure where property is damaged), then it might be rationalized by saying that the judges are in effect according participants in joint ventures limited proprietary or possessory rights in the 'things' which each contributes towards its success.⁶

'Knowledge' and 'joint ventures'

In a revealing passage in the *Caltex* case Stephen J. noted that one element present called for particular comment, namely:

[T]he element of knowledge, actual or constructive, possessed by the defendant about the use of the pipeline to convey products to the plaintiff's terminal. In

⁹⁰ *Ibid.* 576.

¹ *Ibid.* 577.

² 1910 S.C. 772.

³ (1976) 136 C.L.R. 529, 577, *per* Stephen J.

⁴ [1947] A.C. 265 (H.L. (E.)). Although not 'a profit' under a contract with a third party, the economic loss did in that case flow 'from the contractual relationship between the ship and its cargo': *ibid.* 296, *per* Lord Porter.

⁵ *Caltex* (1976) 136 C.L.R. 529, 599, *per* Jacobs J.

⁶ This resembles the way in which the concept of 'an interest in land' has been expanded to render available to an increasing range of plaintiffs the remedies of the tort of private nuisance under the rubric of protection of incorporeal hereditaments: *Heuston R. F. V., Salmond on Torts* (17th ed. 1977) 71-9.

Glanzer v. Sheppard,⁷ a case of economic loss without physical damage, Cardozo J. observed that 'constantly, the bounds of duty are enlarged by knowledge of a prospective use'; this same concept, the defendant's knowledge of a prospective use, was employed by Denning L.J. in *Candler v. Crane, Christmas & Co.*,⁸ and also finds expression in *Hedley Byrne*, in *M.L.C. v. Evans*, in this court and before the Judicial Committee, and in *Dimond Manufacturing Co. v. Hamilton*.⁹ Not only does it form part of the concept of special relationship necessary to establish liability for negligent mis-statement but it is also relevant in establishing the appropriate degree of proximity in cases of negligence by act, as is shown in the extensive reliance placed upon it in *Rivtow Marine*.¹⁰

'Knowledge' was established in *Caltex*, but so also was the factor of a 'joint venture'. The *additional* factor of 'knowledge' encouraged Stephen J. to decide as he did.¹¹ In future cases bearing the clear stamp of 'joint venture' will recovery nevertheless be allowed where 'knowledge' is absent? The *Greystoke Castle* case¹² is of course the archetypal example in this regard. In future situations where although actual knowledge is not established the *likelihood* of joint venture and economic interdependence between property owner and others is high, as in collisions at sea, perhaps recovery will also be allowed.

Knowledge

Joint ventures apart, it is predictable that there will be a gradual expansion of the concept of 'knowledge' in the *Caltex* kind of situation. Indeed already in the *Caltex* situation it would seem that if the defendant knows or has means of knowledge of facts from which a reasonable person would conclude that carelessness on his part would have economic consequences for the particular plaintiff of the kind which occurred knowledge under the *Caltex* rules will be regarded as established. The next step would be where the defendant is negligent in not acquiring such means of knowledge of the essential facts, in other words where he has means of acquiring facts providing means of knowledge.

Should the courts go further in allowing recovery for purely economic loss flowing in the form of secondary harm?

It is the writer's opinion that the present ground rules for recovery of carelessly inflicted purely economic loss — where, as in the circumstances under discussion, it takes the form of a secondary harm — provide a happy balance between the policies against general recovery in this area (discussed in the first two sections) and the claims of the victim of any form of carelessness to compensation through the tort system. In addition to these factors there are the considerations raised by Lord Denning M.R. in *Spartan Steel & Alloys Ltd v. Martin & Co. (Contractors) Ltd*.¹³ His Lordship said of the plaintiff's claim to lost profits when its factory was

⁷ (1922) 23 A.L.R. 1425, 1428 (New York Court of Appeals).

⁸ [1951] 2 K.B. 164 (C.A.).

⁹ [1968] N.Z.L.R. 705.

¹⁰ (1976) 136 C.L.R. 529, 577 f.

¹¹ *Ibid.* 579 f.

¹² [1947] A.C. 265 (H.L. (E.)).

¹³ [1973] Q.B. 27 (C.A.).

shut down due to negligent interruption by highway contractors of the power supply:

Such a hazard is regarded by most people as a thing they must put up with — without seeking compensation from anyone. Some there are who instal [sic] a stand-by system. Others seek refuge by taking out an insurance policy against breakdown in the supply. But most people are content to take the risk on themselves. When the supply is cut off, they do not go running round to their solicitor. They do not try to find out whether it was anyone's fault. They just put up with it. They try to make up the economic loss by doing more work next day. This is a healthy attitude which the law should encourage.¹⁴

There is in this passage a strong endorsement of the view that the law should reflect and reinforce desirable community values; that its rules should be determined, as much as anything else, by a moral view of the demands of social responsibility.¹⁵ Where claims based on undesirable values are made they should be discouraged. Further, it is a policy of the law to promote the utilization and non-monopolization of assets.¹⁶ People should not be encouraged to accumulate assets thereby depriving the community of the advantages which flow from their circulation in the market-place. In the ordinary course of events the kind of claim discussed in *Spartan Steel* will almost inevitably be made by corporate plaintiffs. The prospect of recovery by the company in such circumstances would positively discourage its invention of alternatives to deal with the emergency situation and would positively encourage corporate management to allow plant and equipment to remain idle for as long as possible during the emergency, safe in the knowledge that profits will be recouped from the careless defendant whose conduct occasioned the loss, to say nothing of false claims which it would be impossible to check.¹⁷ Apart from special situations involving 'deserving plaintiffs'¹⁸ — and the categories which have so far emerged are few, such as those whose economic loss is consequential upon physical damage; those whose property (or person?) was also at risk in a joint venture with a third party who sustained such loss; and those whom the defendant knew would be economically affected — it is appropriate that the risk should be shared around.¹⁹

B PURELY ECONOMIC LOSS FLOWING FROM CONDUCT NOT IN ITSELF DIRECTLY CAPABLE OF CAUSING PHYSICAL HARM

Introduction

After *Hedley Byrne*²⁰ it came to be generally recognized that outside the areas of contractual and fiduciary relationships a relationship could

¹⁴ *Ibid.* 38.

¹⁵ See also Weir, *op. cit.* 45.

¹⁶ Cf. the rule against perpetuities, testator's family maintenance legislation etc.

¹⁷ *Spartan Steel & Alloys Ltd v. Martin & Co. (Contractors) Ltd* [1973] Q.B. 27, 38 f., per Lord Denning M.R.

¹⁸ *Ibid.* 39, per Lord Denning M.R.

¹⁹ *Ibid.*

²⁰ [1964] A.C. 465 (H.L. (E.)).

exist between the parties which was sufficiently close to warrant the imposition of a duty of care in such matters as advising, assembling, assessing and imparting information, or conducting a business transaction and supervising the conduct of others, even though the potential harm if carelessness should occur could only ever be purely economic or where the loss in fact took that form. But because the liability generating factors in such situations are particularly 'weak', the role of policy has been particularly 'strong'. It has operated on two levels: in the formulation of the basic ground rules for determining duty in this area, which have been very narrowly defined; and in the decision in a particular situation which might seem to have the necessary characteristics to satisfy these ground rules and thus to warrant imposition of the duty nevertheless to withhold it, such 'policy' decisions being particularly prevalent in this area.

The problem in the misstatement situation is quite distinct from that arising in the purely economic secondary harm cases and the solutions adopted are thus different. It would be wrong to extrapolate from *Hedley Byrne* to *Caltex*, or back again. But a common device has been employed in both to generate liability.

The essence of liability where imposed under *Hedley Byrne* is the existence of a situation which is almost contractual.²¹ The defendant knows of the *transaction* involving the plaintiff and *undertakes, knowing of the plaintiff's reliance*, to take care in his conduct affecting this transaction. There is privity but no consideration. Because there is no consideration in the *Hedley Byrne* situation the defendant is not obliged to begin to act on the plaintiff's behalf. An effect of the presence of consideration is the creation of a duty to act. Its absence prevents such a duty. But if in the course of his business the defendant does volunteer to act, he must take reasonable care in carrying out his undertaking. *Hedley Byrne* 'was very much nearer contract than to tort'.²² It affects the line of cases of which *Derry v. Peek*²³ is a part rather than the line of which *Caltex* is a part. In the *Caltex* situation the device of 'knowledge' has also been employed. But there is also, lurking below the surface in *Caltex*, the 'joint venture' concept.

The courts, as was noted above, are concerned in the misstatement situation with liability for careless conduct affecting economic decision-making by the plaintiff and others.²⁴ The following is but a broad summary

²¹ *Ibid.* 530, per Lord Devlin; and *The World Harmony* [1967] P. 341, 362. If this did not emerge clearly and unanimously from *Hedley Byrne* itself (see Craig P. P., 'Negligent Misstatements, Negligent Acts and Economic Loss' (1976) 92 *Law Quarterly Review* 213, 214-7) it is clearly established as the basis for recovery where misstatement leads to purely economic loss by *Mutual Life and Citizens' Assurance Co. Ltd v. Evatt* [1971] A.C. 793 (P.C.).

²² *The World Harmony* [1967] P. 341, 362, per Hewson J.

²³ (1889) 14 App. Cas. 337 (H.L. (E.)).

²⁴ The very broad definition of 'misstatement' adopted in this article is set out *supra* 87.

of the rules for liability *outside the areas of contract and fiduciary relationship* as established by a series of decisions, English and Australian, subsequent to the *Evatt* case.

The ground rules for recovery in negligence of purely economic loss flowing from careless misstatement

In order for there to be liability in negligence for careless conduct in the form of misstatement causing purely economic loss:

1. The defendant's conduct must have been pursued in the course of his profession, trade, business or vocation²⁵ and must relate to it;²⁶

OR,

if his engagement in such conduct would take him outside his profession, trade, business or vocation, he must have represented that he possessed and would exercise the special skills required of the professional;²⁷

OR,

as is emerging in England, the misstatement must be made in a business or professional context.²⁸

2. The defendant must have undertaken to take care of the plaintiff's interests in circumstances where reliance on this undertaking by the plaintiff would be reasonable.²⁹

3. The defendant must have had knowledge or means of knowledge³⁰ of the fact or likelihood that the plaintiff³¹ would be reliant upon his taking care in the course of the conduct which he has undertaken.³²

4. The defendant must have had knowledge or means of knowledge of the actual or proposed transaction involving the plaintiff, decision-making in relation to which his conduct was likely to affect.³³

²⁵ *Evatt* [1971] A.C. 793 (P.C.).

²⁶ *Presser v. Caldwell Estates Pty Ltd* [1971] 2 N.S.W.L.R. 471 (C.A.).

²⁷ *Evatt* [1971] A.C. 793 (P.C.); *O'Leary v. Lamb* (1974) 7 S.A.S.R. 159. It is not as yet clear whether he must 'possess' and 'profess' the skill of the professional or whether it is sufficient that he merely professes that skill: *ibid.* 190, *per* Bray C.J.

²⁸ *Argy Trading Development Co. Ltd v. Lapid Developments Ltd* [1977] 1 W.L.R. 444; *Howard Marine and Dredging Co. Ltd v. A. Ogden & Sons (Excavations) Ltd* [1978] Q.B. 574 (C.A.), endorsing the minority view in *Evatt*. Gravells N. P., 'Negligent Misrepresentation: A Restrictive Approach' (1978) 94 *Law Quarterly Review* 334.

²⁹ *Hedley Byrne* [1964] A.C. 465, 528-33, *per* Lord Devlin (H.L. (E.)); *Evatt* [1971] A.C. 793, 806 (P.C.). *Cf.* *Dominion Freeholders Ltd v. Aird* (1966) 67 S.R. (N.S.W.) 150 (C.A.). And see *supra* n. 28.

³⁰ *Caltex* (1976) 136 C.L.R. 529, 577 f., *per* Stephen J., discussing *Hedley Byrne* and *Evatt*; and see *Hedley Byrne* [1964] A.C. 465, 486, 503, 514 (H.L. (E.)).

³¹ But the precise identity of the plaintiff need not be known, as in *e.g.* *Hedley Byrne* itself.

³² *Hedley Byrne* [1964] A.C. 465, 503, 513 (H.L. (E.)). *Cf.* *Woods v. Martins Bank Ltd* [1959] 1 Q.B. 55.

³³ *Cann v. Wilson* (1888) 39 Ch.D. 39; and see *Seton, Laing & Co. v. Lafone* (1887) 19 Q.B.D. 68, 72, *per* Lord Esher M.R.; *O'Leary v. Lamb* (1974) 7 S.A.S.R. 159, 189 f.

5. The duty is to take *reasonable care* of the plaintiff's interests in the performance of that which has been undertaken³⁴ so as not to mislead the plaintiff and others in their decision-making in the transaction in question. There is no liability for omitting to act in the interests of the person for whose benefit if one were to commence to act one would owe a duty of care.³⁵
6. Such a duty is said to arise out of a 'special relationship' between the parties.³⁶
7. A duty of care arising pursuant to rules 1-5 above is not precluded by the existence of contractual or pre-contractual relations between the parties.³⁷
8. The effect of the possession by the defendant of a financial interest in the outcome of his conduct is unclear. There are two views. On the one hand it is said that the possession of such an interest makes it easier to infer the necessary 'profession' of special skill or knowledge.³⁸ On the other hand it is said that such financial interest in itself warrants the imposition of a duty.³⁹

Should the courts go further in allowing recovery for purely economic loss flowing from careless misstatement?

There seems good reason for limiting liability for the kind of advice sought in the *Evatt* case to those situations where it has been paid for. In other words, the investor who lays out money on credit or in the hope of a profit should do so at his own risk, at least where the risk is one of being carelessly misinformed, *unless* the defendant is prepared under contract to run it for him. The circumvention in *Anns* of the requirement of a 'special relationship' in what was essentially a misstatement and purely economic loss situation by the device of reclassifying the loss caused by the defendant council in that case as 'physical' results in an inappropriate class, the ratepayers, assuming the risk of an investor's bad bargain, a result which can be avoided under *Evatt*. An Australian court's insistence that, in effect, only consideration will create a duty to inform⁴⁰ is both conceptually sound and an appropriate place at which to draw the

³⁴ *McInerny v. Lloyds Bank* [1974] 1 Lloyd's Rep. 246, 254 (C.A.).

³⁵ See *infra* n. 40.

³⁶ *Presser v. Caldwell Estates Pty Ltd* [1971] 2 N.S.W.L.R. 471, 490 f., per Mason J.A., as he then was, pointing out that the neighbour principle does not underlie the liability for misstatements causing purely economic loss; *Hedley Byrne* [1964] A.C. 465, 528, 530 f., per Lord Devlin (H.L. (E.)).

³⁷ *Esso Petroleum Co. Ltd v. Mardon* [1975] Q.B. 819 (C.A.); *Dillingham Constructions Pty Ltd v. Downs* [1972] 2 N.S.W.L.R. 49.

³⁸ *Presser v. Caldwell Estates Pty Ltd* [1971] 2 N.S.W.L.R. 471, 483-5, 493 (C.A.); *Ellul v. Oakes* (1972) 3 S.A.S.R. 377, 392 (F.C.).

³⁹ *Jenkins v. Godfrey Hirst of Australia Pty Ltd* (1974) 3 N.S.W.D.C.R. 214; *O'Leary v. Lamb* (1973) 7 S.A.S.R. 159, 190.

⁴⁰ *Lietzke (Installations) Pty Ltd v. M.J. Morgan Pty Ltd* (1975) 5 S.A.S.R. 88 (F.C.); *Argy Trading Development Co. Ltd v. Lapid Developments Ltd* [1977] 1 W.L.R. 444.

line; accordingly, the view that in the circumstances in *Rivtow Marine*⁴¹ there could be a duty on the manufacturer to warn a user of his product of defects which cause the latter only economic loss goes too far and ought not to be followed. Finally, it is submitted that the courts in this area have been correct in refusing and should continue to refuse to use the developments from *Hedley Byrne* as a guise for inquiring into decision-making of a political nature or by experts of a high order in a given field.

Further problems: statutory bodies

This summary hardly exhausts the difficulties inherent in the cases developing the *Hedley Byrne* and *Evatt* principle. In particular, acute difficulties have emerged where authorities acting under statutory powers provide misleading certificates or development consents⁴² or carelessly omit to inspect or carelessly carry out inspections or otherwise carelessly perform or omit to perform their powers in relation to chattels and structures in preparation for the market in such a way as to mislead the ultimate purchasers into making a bad bargain⁴³ or engaging in some other transaction resulting in loss of wealth. One difficulty in this area is to satisfy the undertaking/reliance requirement which is so fundamental to *Hedley Byrne*. How can it be said that a defendant who is statutorily obliged to make a search assumes a responsibility to take care of the economic interests of the plaintiff in a particular transaction? It is for this reason, it is respectfully submitted, that in recent judgments at first instance Australian courts have been correct in holding that local councils owe no duty of care to land speculators as to the way in which they exercise their powers to refuse, permit or regulate proposed developments.⁴⁴ The undertaking required for success under the *Hedley Byrne* principle would be beyond the powers of most statutory bodies, and if solicited by the plaintiff his reliance might not be regarded as reasonable. Consistent with this has been the recent refusal to recognize a duty in a local government authority when furnishing information required by statute to give consideration to the question of how the information might be significant to the interests of the applicant, on the ground that the imposition on a local government authority of duties of this kind as a corollary to a statutory duty to provide information would be unduly burdensome.⁴⁵ Another difficulty is that of establishing that in making a

⁴¹ (1973) 40 D.L.R. (3d) 530 (Supreme Court of Canada). In that case it was held unanimously that the manufacturer and supplier of an article who know that the user relies on them for advice concerning its operation are under a duty to warn the user of the necessity for repairs as soon as they become aware of the defects, so as to avoid economic loss from its immobilization for repairs.

⁴² *Ministry of Housing and Local Government v. Sharp* [1970] 2 Q.B. 223 (C.A.); *Hull v. Canterbury Municipal Council* [1974] 1 N.S.W.L.R. 300; *G.J. Knight Holdings Pty Ltd v. Warringah Shire Council* [1975] 2 N.S.W.L.R. 796.

⁴³ See *Anns* [1978] A.C. 728 (H.L. (E.)).

⁴⁴ *Dunlop v. Woollahra Municipal Council* [1978] A.C.L.D. No. 650 (N.S.W.); and *Shaddock v. Parramatta* (N.S.W., unreported 1978).

⁴⁵ *Shaddock v. Parramatta*.

search, issuing a certificate or whatever, the statutory authority is involved in exercising the skill and competence associated with a particular calling: an essential element in the *Evatt* formula.⁴⁶

C RESTATEMENT OF THE GROUND RULES FOR RECOVERY OF PURELY ECONOMIC LOSS

It is now appropriate to attempt to set out the ground rules for recovery of purely economic loss as they stood prior to the landmark cases and as they now stand.⁴⁷ The changes are stated as narrowly as the authorities permit, because it is predictable that the judges will quite properly resist extravagant claims such as that liability for words has been assimilated with liability for acts, or that liability for purely economic loss is determined on the same basis as that for physical harms. The rules were, and would now appear to be, as follows:

- (1) Those with proprietary or possessory interests in property carelessly damaged by the defendant may bring an action in negligence for economic loss flowing from that damage, *as may those who are to the knowledge of the defendant economically dependent on the use of such property as part of a joint venture with its owner.*⁴⁸
- (2) Where purely economic loss is suffered in consequence of an interference by the defendant with a beneficial relationship between the plaintiff and another person (*i.e.* where it is an indirectly caused purely economic loss) there will be liability only where it was intentionally inflicted by unlawful means *or, in the event of such loss having been caused by mere carelessness, where the beneficial relationship is one between the plaintiff and a third party with whom he is engaged in a joint venture,*⁴⁹ *the loss having been caused by the breach of a duty of care between plaintiff and defendant of a kind recognized by the Caltex case.*
- (3) If an economic loss arises in a way which can only be characterized as the loss of the benefit of a contract with a third party *other than a joint venturer*⁵⁰ it will not be recoverable, because the loss of the benefit of a contract with a third party is not, *subject to the joint venture exception*, a kind of injury which of itself gives rise to a duty of care.
- (4) Where the plaintiff has been misled by the defendant into contracting or entering into some other kind of transaction with the defendant

⁴⁶ *Ibid.*

⁴⁷ The additions and modifications appear in italics. The statement ignores problems such as *Beaudesert Shire Council v. Smith* (1966) 120 C.L.R. 145 and exceptions such as the *actio per quod servitium amisit* and under Lord Campbell's Act.

⁴⁸ *Caltex* (1976) 136 C.L.R. 529.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

or a third party, economic loss flowing to the plaintiff from such conduct will be recoverable against the defendant only where it breaches a contractual or fiduciary relationship with the plaintiff *or where it breaches a 'special relationship' equivalent to contract, the defendant in the latter situation being in the business of such conduct or professing (and possibly possessing) equivalent skills.*⁵¹

- (5) Purely economic loss flowing from conduct not in itself capable even if carelessly performed of directly causing physical harm is not recoverable in negligence simply because it happens to have been reasonably foreseeable, *unless it takes the form of loss or diminution in the value of a chattel*⁵² *or structure caused by the defendant's conduct in failing to take care in his part of the production or erection of that chattel or structure,*⁵³ *or, in the case of a statutory defendant exercising statutory powers, caused by the defendant's ultra vires conduct in failing to exercise carefully its powers over the production or erection of that chattel or structure,*⁵⁴ *and, in either case, where such conduct can be related to the possible safety or health of the future consumer, owner or occupier of the chattel or structure and, possibly, of their property.*⁵⁵

⁵¹ *Evatt* [1971] A.C. 793 (P.C.). But for clear manifestations of the tendency to relax this requirement see cases cited *supra* 116 n. 28.

⁵² *Anns* [1978] A.C. 728, 759 f., *per* Lord Wilberforce, expressly endorsing the dissenting judgment on this question of Laskin J. in *Rivtow Marine Ltd v. Washington Iron Works* (1973) 40 D.L.R. (3d) 530.

⁵³ *Batty v. Metropolitan Property Realisations Ltd* [1978] Q.B. 554 (C.A.). Duncan Wallace I. N., 'Negligence and Economic Loss' (1978) 94 *Law Quarterly Review* 331.

⁵⁴ *Anns* [1978] A.C. 728 (H.L. (E.)).

⁵⁵ *Batty's case* [1978] Q.B. 554 (C.A.).